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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JULY 20, 1937.

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 15562.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, James D. Marnane and Harry A. Barr, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General of the State of Illinois.

BILL OF COMPLAINT OF NATURAL GAS PIPELINE COMPANY OF AMERICA, A CORPORATION—Filed March 11, 1937

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Natural Gas Pipeline Company of America, Plaintiff, brings this, its bill of complaint, against the defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr, the persons constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General for the State of Illinois, and for its cause of action alleges:

1. The plaintiff, Natural Gas Pipeline Company of America, formerly Continental Construction Corporation, is a corporation organized in 1930 under and existing by virtue of the laws of the State of Delaware, is a citizen and resident of the State of Delaware, has offices at 19-20 Dover Green, Dover, Delaware, and at 20 North Wacker Drive, Chicago, Illinois, and brings this suit in its own behalf.

2. The defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr, are the persons who presently constitute the Illinois Commerce Commission, which is an administrative body created by and acting under and pursuant to an act of the General

Assembly of the State of Illinois, entitled, "An Act Concerning Public Utilities", approved June 29, 1921 and in force July 1, 1921, hereinafter referred to as "Public Utilities Act". Said defendants will hereinafter be referred to collectively as "Illinois Commerce Commission." The defendant, Otto Kerner, is the Attorney General of the State of Illinois and is the legal counsel for the Illinois Commerce Commission, charged with the duty of commencing and conducting suits and proceedings to enforce the orders of the Commission and the provisions of the Public Utilities Act, and to recover and enforce the fines and penalties im- [fol. 4] posed by the Public Utilities Act for its violation, or the violation or non-obedience of the orders of the Illinois Commerce Commission. Each of said defendants is a resident and a citizen of the State of Illinois and subject to the jurisdiction of this Court.

3. This is a suit of a civil nature, arising under the Constitution and the laws of the United States of America, between citizens of different states, and within the equity jurisdiction of the District Court of the United States, and is brought for the purpose of enjoining the enforcement of a certain order of said Illinois Commerce Commission dated March 3, 1937, and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000).

4. Plaintiff is engaged in the sale, transportation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois. Said natural gas is transported from said point or points in the State of Oklahoma to said consumers or distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of a system of pipe lines and pumping stations. Plaintiff's business and commerce is wholly interstate and national in character, and plaintiff is not engaged in intrastate commerce within the State of Illinois. Plaintiff has not qualified to do an intrastate business within the State of Illinois under the terms and provisions of the laws of the State of Illinois, and is not a public utility nor subject to the jurisdiction or control of the Illinois Commerce Commission under said Public Utilities Act.

5. On or about the 25th day of July, A. D. 1931 the plaintiff, then known as Continental Construction Corporation, and Chicago District Pipeline Company, an Illinois corporation, made and executed a certain agreement in writing dated July 25, 1931 for the sale of natural gas to the said Chicago District Pipeline Company, a true copy of which is attached hereto as Exhibit A. On or about the 31st day of December, A. D. 1935 the plaintiff and the Chicago District Pipeline Company made and executed a certain agreement of forebearance, a true copy of which it attached hereto as Exhibit B.

6. Chicago District Pipeline Company is engaged in the sale, transportation and delivery of natural gas within the State of Illinois, and plaintiff is informed and believes that said Chicago District Pipeline Company is solely engaged in intrastate commerce within the State of Illinois and is a public utility within the scope and meaning of the Public [fol. 5] Utilities Act and is subject to and under the jurisdiction of the Illinois Commerce Commission pursuant to the terms and provisions of the Public Utilities Act.

7. On or about the 17th day of November, A. D. 1936 the Illinois Commerce Commission issued a certain citation against the Chicago District Pipeline Company, a true copy of which is attached hereto as Exhibit C, and the Chicago District Pipeline Company appeared in response to said citation. Thereafter hearings were instituted by said Illinois Commerce Commission on said citation, and on the third day of March, 1937, and after the Chicago District Pipeline Company had closed its evidence, completed its proof and rested its case, an order was entered by said Illinois Commerce Commission in said cause, directing and commanding the plaintiff to file forthwith with said Illinois Commerce Commission, and on or before the 15th day of March, A. D. 1937, a true and accurate report as to the cost of the property of the plaintiff which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to said Illinois Commerce Commission, in substitution thereof, a true and accurate statement as to the cost of all its property or properties used by it in the business of transporting and selling natural gas, together with

a statement as to the income and expenses for such operations, and further ordering the plaintiff to make available for the examination of said Illinois Commerce Commission, its officers, agents and employees, all of plaintiff's accounts and records relating to transactions between plaintiff and [fol. 6] Chicago District Pipeline Company, including all accounts and records as to joint or general expenses, any portion of which may be applicable to said transactions. A true copy of said order is attached to this bill as Exhibit D.

8. Plaintiff is not a party to said citation or to said proceedings against the Chicago District Pipeline Company, and said order of March 3, 1937 was made and entered by Illinois Commerce Commission without notice to plaintiff and without giving the plaintiff an opportunity to be heard.

9. Chicago District Pipeline Company and the plaintiff are not subject to common control through common stock ownership, or in any other manner. At all times mentioned herein prior to September 1, 1931, all or substantially all of the outstanding common capital stock of Chicago District Pipeline Company was owned or held by Insull Son & Co., Inc., an Illinois Corporation, and, since September 1, 1931, by Natural Gas Investment Company, an Illinois Corporation. The outstanding stock of Natural Gas Pipeline Company at the times hereinafter mentioned was and is held by the following named corporations, substantially in the amounts indicated, viz.:

	Distribution on July 25, 1931	Distribution on December 31, 1935	Present distribution
Insull Son & Co., Inc. an Illinois corporation ...	26.63%	0.00%	0.00%
Cities Service Company a Delaware corporation..	26.63%	26.63%	26.63%
Natural Gas Investment Company, an Illinois corporation	0.00%	26.63%	26.63%
The Texas Corporation, a Delaware corporation .	17.58%	17.58%	17.58%
Standard Oil Company a New Jersey Corporation	26.62%	13.31%	13.31%

	Distribution on July 25, 1931	Distribution on December 31, 1935	Present distribution
Southwestern Development Company, a Colorado corporation	0.00%	13.31%	13.31%
Columbian Carbon Company, a Delaware corporation	2.53%	2.53%	2.53%

On July 25, 1931 all or substantially all of the outstanding capital stock of Insull Son & Co., Inc., was owned or held by Insull Utility Investments, Inc., an Illinois corporation, which was not owned or controlled directly or indirectly by any one or more of the above listed corporations. Plaintiff is informed and believes that the outstanding capital stock of Natural Gas Investment Company is held by the following named corporations substantially in the amounts indicated:

[fol. 7] Peoples Gas Subsidiary Corporation, an Illinois corporation	79.54%
Commonwealth Subsidiary Corporation, an Illinois corporation	4.28%
Public Service Co. of Northern Illinois, an Illinois corporation	16.18%

And plaintiff is further informed and believes that all of the outstanding capital stock of Peoples Gas Subsidiary Corporation, an Illinois corporation, is owned by The Peoples Gas Light and Coke Company, an Illinois corporation; and that all of the outstanding capital stock of Commonwealth Subsidiary Corporation, an Illinois corporation, is owned by Commonwealth Edison Company, an Illinois corporation.

10. The affairs of the plaintiff and of Chicago District Pipeline Company are controlled by their respective Boards of Directors and officers acting pursuant to their charters and the laws of the states of their incorporation. At the time of the negotiation for and execution of said contract of July 25, 1931, the Board of Directors of the plaintiff corporation consisted of eight members, and said board has subsequently been enlarged to include nine members, but at all times mentioned herein Natural Gas Invest-

ment Company and Insull Son & Co., Inc., have been represented by not more than two members of said board and neither Natural Gas Investment Company, Insull Son & Co., Inc., nor any other of the corporations named above, have ever controlled or attempted to control said board, and at none of the times mentioned herein was there any common control of the Boards of Directors of the plaintiff and of Chicago District Pipeline Company. Since the date of plaintiff's incorporation, and until February 9, 1937 one of the two members of plaintiff's board of directors represent-
[fol. 8] ing Natural Gas Investment Company or Insull Sons & Co., Inc., has been elected vice president of Natural Gas Pipeline Company of America, but said vice president never exercised any function of said office nor taken any part in the control or management of plaintiff's business or affairs as such officer, and has received no compensation as vice president and, since February 9, 1937, none of the directors representing Natural Gas Investment Company has been an officer of Natural Gas Pipeline Company of America.

11. Plaintiff alleges, and the attorneys, agents and representatives of the Illinois Commerce Commission so state, that said Illinois Commerce Commission proposes, threatens and intends to regulate, supervise and control the contracts, rates and other affairs of the plaintiff, and otherwise exercise jurisdiction and control over the plaintiff, and as preliminary thereto to inquire into the earnings, expenses and profits of the plaintiff, the value of its properties and investments, and the other business affairs of the plaintiff; that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Company and Natural Gas Pipeline Company of America as affiliated corporations with common stock ownership, and subject to common control, to regulate the business affairs of said corporations as a single enterprise under the jurisdiction of said Illinois Commerce Commission, to take jurisdiction of and regulate the profits and income of the plaintiff, and to exercise all power, control and dominion over the plaintiff, which purports to have been granted to said Illinois Commerce Commission by Section 8a of said Public Utilities Act referred to in said order.

12. Plaintiff avers that the Illinois Commerce Commission is not authorized nor empowered to inquire into, in-

vestigate or require the disclosure of the earnings, expenses or profits of the plaintiff, nor the value of its properties or investments, nor any other business or affairs of the plaintiff, and further alleges that said Illinois Commerce Commission is not authorized or empowered nor has it authority or jurisdiction to regulate, control, supervise or interfere with the contracts or other business affairs of the plaintiff, and avers that the Public Utilities Act, and particularly Section 8(a) thereof, has no application to the plaintiff company and that said Act is wholly null and void in so far as said act or said Section 8(a) thereof purport to confer upon the Commission any jurisdiction or authority over the plaintiff, its officers or agents, or the plaintiff's business, books, records, contracts or affairs.

[fol. 8½] Plaintiff further states that said Illinois Commerce Commission is not authorized or empowered nor has authority or jurisdiction under said Public Utilities Act, or otherwise, to require the plaintiff to file with said Illinois Commerce Commission a report as to the cost of the property of the plaintiff which is used in supplying natural gas to said Chicago District Pipeline Company, or a statement of the income or expenses of the plaintiff in connection with supplying gas to said Chicago District Pipeline Company, or to report to said Illinois Commerce Commission as to the cost of all or any part of its property or properties used by it in the business of transporting and selling natural gas, or to make or disclose any statement as to its income or expenses from such operations or to require the plaintiff to make available for examination by said Illinois Commerce Commission, or its officers, agents or employees, any of its accounts or records relating to transactions between said Natural Gas Pipeline Company of America and Chicago District Pipeline Company, either including or excluding accounts and records as to joint or general expense, any portion of which may be applicable to said transactions, as ordered and directed in said order of the Illinois Commerce Commission dated March 3, 1937, and plaintiff avers that said order is wholly null and void.

13. Plaintiff further alleges that said order of March 3, 1937, and Section 8(a) of said Public Utilities Act deprive the plaintiff of property without due process of law and deny to the plaintiff the equal protection of the laws, and subject plaintiff's books, records, papers and effects to un-

lawful searches and seizures, and that said order and said section of said Public Utilities Act are in violation of and prohibited by the Constitution of the United States of America and Section One of the Fourteenth Amendment thereto.

14. If the Illinois Commerce Commission is permitted to enforce said order of March 3, 1937, herein complained of, plaintiff will suffer great inconvenience and expense, plaintiff's trade secrets, secret processes and methods of doing business will be exposed to its competitors, plaintiff's credit will be impaired, and plaintiff will be hampered and hindered in its commerce and business affairs, and will suffer divers other great and irreparable harm and injury, all to its great injury and irreparable loss and damage; and plaintiff will be deprived of its property and civil rights without due [fol. 9] process of law, and denied the equal protection of the law, and its papers and effects will be subject to unreasonable search and seizure in violation of the Fourteenth Amendment to the Constitution of the United States of America and Section 6 of Article 2 of the Constitution of the State of Illinois, and plaintiff's interstate commerce will be burdened and obstructed and hampered in violation of the Constitution and the laws of the United States of America.

15. The penalties provided by said Public Utilities Act for violation of or non-obedience of the orders of the Illinois Commerce Commission are so large and so severe as to intimidate the plaintiff, its officers and agents, and to render it impracticable for the plaintiff to risk the imposition of said penalties or to resist said unlawful order except in this Honorable Court. Unless the Illinois Commerce Commission and the said Otto Kerner are restrained and enjoined as herein prayed, they will proceed with the proposed and threatened inquiry and investigation of the plaintiff's affairs as set out above, and will compel the plaintiff, its officers, agents and employees to comply with said order of the said Illinois Commerce Commission herein complained of, and enforce the penalties prescribed by the laws of the State of Illinois for violation of or non-obedience to said order, and plaintiff, its officers, agents and employees will be coerced by the threat of said penalties into compliance with said order, to the great inconvenience, expense and irreparable loss and damage of the plaintiff.

16. The plaintiff has no adequate and complete remedy at law, and only in a suit in equity and by the final decree and order of injunction of this court can the plaintiff be protected in its property and constitutional rights, and the plaintiff states its willingness and intention and hereby offers to do equity in the premises.

[fol. 10] Wherefore, Plaintiff prays:

(a) That the order of said Commission, dated March 3, 1937, and herein described and complained of, be decreed to be in violation of the Constitutions and laws of the United States of America and of the State of Illinois and beyond the scope of the powers of the Illinois Commerce Commission, and to be totally void;

(b) That a three judge court be constituted as provided in Section 266 of the Judicial Code, and that the defendants and each of them and all other persons be temporarily and permanently restrained and enjoined from enforcing said order.

(c) That the defendants and each of them, and all other persons, be temporarily and permanently restrained and enjoined by said court from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any penalties, or any other remedy for disregarding said order described above;

(d) That the Illinois Commerce Commission and the said Otto Kerner and each of them be temporarily and permanently restrained and enjoined by this court from taking any action directly or indirectly to enforce said order of March 3, 1937 in any manner or degree, and that said defendants be temporarily and permanently enjoined and restrained from exercising or attempting to exercise any jurisdiction or control over this plaintiff, its officers, directors, agents or employees;

(e) That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it Please Your Honors to grant unto the plaintiff a writ of subpoena of the United States of America, issuing out of and under the seal of this Honorable Court, directed to said defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James E. Marnane and Harry A. Barr,

the persons presently constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General of the State of Illinois, commanding them and each of them on a day certain to be named therein, and under a certain penalty, to be and to appear before this Honorable Court, then and there to answer, but not under oath, answer under oath being expressly waived, all and singular of the premises, and to perform and to abide by such order, direction or decree as may be made against them in the premises, and that, pending the hearing and determination of the application for a permanent injunction herein, a temporary restraining order may be issued as above prayed.

[fol. 11] And the plaintiff will ever pray.

Natural Gas Pipeline Company of America, by Floyd C. Brown, Its Vice-President and General Manager. Sidley, McPherson, Austin & Burgess, Attorneys for said Natural Gas Pipeline Company of America. J. J. Hedrick, Donald F. McPherson, Howard Neitzert, of Counsel for the Plaintiff.

Duly sworn to by Floyd C. Brown. Jurat omitted in printing.

[fol. 12] EXHIBIT "A" TO COMPLAINT

Contract Between Continental Construction Corporation and Chicago District Pipeline Company

Dated July 25, 1931

[fol. 12-1] This Agreement, made and entered into this 25th day of July, 1931, by and between Continental Construction Corporation, a Delaware corporation, hereinafter referred to as "Seller," and Chicago District Pipeline Company, an Illinois corporation, hereinafter referred to as "Buyer,"

Witnesseth:

Whereas, Seller is now constructing a twenty-four inch (24") pipe line from a point in Beaver County, Oklahoma, to a point near the City of Joliet, Illinois, hereinafter specified, through which Seller proposes to transport natural gas; and

Whereas, Seller is willing to sell and deliver to Buyer at the said point near the City of Joliet, Illinois, and at other points hereinafter referred to, and Buyer is willing to purchase from Seller and receive at said points, a supply of natural gas in the quantities and upon the terms and conditions hereinafter stated;

Now, Therefore, in consideration of the premises and their mutual covenants hereinafter set forth, the parties agree as follows:

Article I

Seller agrees:

Section 1. That it will proceed diligently with the construction of the twenty-four inch (24") pipe line hereinbefore referred to, extending from a point in Beaver County, Oklahoma, to a point in the southwest quarter of the southwest quarter of the southwest quarter of Section 18, Township 35 North, Range 10 East of the 3rd Principal Meridian, in Will County, in the State of Illinois, which point is near the City of Joliet, Illinois, and that said pipe line will be equipped with such compressor stations and [fol. 12-2] other auxiliary apparatus as will render it capable of delivering at the point or points of delivery hereinafter referred to natural gas in such quantities as Seller is obligated to deliver to Buyer hereunder.

Section 2. (a) That it will procure and enter into a contract with Texoma Natural Gas Company, a Delaware corporation, hereinafter referred to as "Texoma", wherein Texoma shall, subject to the contingencies set out in Section 11 of Article III hereof, agree:

(1) To maintain and develop such of the natural gas rights from time to time owned by it in Moore, Carson, Potter, Hutchinson and Gray Counties in the State of Texas as shall be necessary to enable it to produce natural gas in quantities which, with such additional quantities as may be purchased by Texoma, shall be sufficient to enable it to meet the obligation expressed in clause (3) of this sub-section (a) of this Section.

(2) To construct from a junction with the above mentioned pipe line in Beaver County, Oklahoma, to a point near Fritch, Texas, a twenty-four inch (24") pipe line and to construct and connect therewith gathering lines and other

equipment adequate to procure and deliver to Seller natural gas produced in Moore, Carson, Potter, Hutchinson and Gray Counties in the State of Texas;

(3) To sell and deliver to Seller at said junction point a supply of natural gas sufficient to meet all of Seller's requirements, so long as such supply is available from the properties, wells and gas purchase contracts of Texoma;

(b) That all obligations of Buyer under this contract are subject to the express condition that Seller shall enter into a contract with Texoma in accordance with the provisions of sub-section (a) of this Section.

[fol. 12-3] (c) That such contract between Seller and Texoma may be modified in any respect so long as Seller is not thereby rendered unable to perform its obligations hereunder.

Section 3. That it will sell and deliver to Buyer, at the prices and upon the other terms and conditions hereinafter specified, natural gas in such quantities as Buyer shall from time to time desire to purchase up to, but not exceeding, one hundred thirty million (130,000,000) cubic feet per day or such larger quantity in any day as Seller shall actually have delivered on any prior day and with respect to which Buyer shall accordingly have become obligated hereunder to pay a capacity charge; except that Seller shall not at any time be obligated to deliver during any hour more than one twenty-fourth (1/24) of the maximum quantity which it is at that time obligated to deliver hereunder in any day.

Section 4. That should Buyer on or before March 1st in any year up to and including 1936 request the right to take from Seller a quantity of gas per day larger than the quantity which Seller shall at the time of such request be obligated to deliver under Section 3 of this Article, and not exceeding a total of three hundred million (300,000,000) cubic feet, Seller shall on October 31st of such year or any day thereafter deliver to Buyer when requested by it all or any part of such specified quantity, except that if the quantity so specified exceeds by more than fifty million (50,000,000) cubic feet the quantity which Seller shall at the time of such request be obligated to deliver under Section 3 of this Article, Seller shall be obligated to deliver that part of such specified quantity which exceeds the quantity which Seller

shall at the time of such request be obligated to deliver under Section 3 of this Article only on and after October 31st of the year following that in which the request is made.

[fol. 12-4] Section 5. That the gas to be delivered by Seller hereunder shall be natural gas as produced in its natural state from wells in Hartley, Moore, Carson, Potter, Hutchinson, Gray and Wheeler counties in the State of Texas, or other natural gas fields the gas from which shall have constituents and burning characteristics substantially like those of the natural gas then being produced in the above mentioned area, except (a) that said natural gas shall at all times comply with the requirements as to purity hereinafter expressed, (b) that Seller may extract or permit the extraction of moisture, helium, natural gas gasoline, butane and/or propane from said natural gas before delivery thereof to Buyer, (c) that Seller may subject or permit the subjection of the gas to compression, cooling, cleaning and other processes to such an extent as may be required in its transportation from the wells to the point or points of delivery, and (d) that the weighted average total heating value of the gas delivered in any day shall not in any event be less than nine hundred fifty (950) British thermal units per cubic foot.

Section 6. That it will deliver such gas to Buyer at the principal point of delivery hereinafter specified at substantially such pressures as Buyer shall from time to time specify up to, but not exceeding, three hundred (300) pounds per square inch gauge; that it will deliver gas to Buyer at other points of delivery hereinafter specified at substantially such pressure as Buyer shall specify not oftener than daily, up to but not exceeding, three hundred (300) pounds per square inch gauge; and that it will begin such delivery as soon as practicable after the said pipe line now being constructed by it is completed and ready for commercial operation.

Section 7. That the gas delivered hereunder

(a) shall be commercially free from solid and/or liquid matter;

[fol. 12-5] (b) shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet; provided that this purity requirement shall be considered

as satisfied if a strip of white filter paper, recently moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water, be exposed to the gas for one and one-half (1½) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas not impinging from a jet upon the test paper, and after this exposure the test paper is found not distinctly darker than a second paper freshly moistened with the solution and not exposed to the gas;

(c) shall not contain more than thirty (30) grains of total sulphur per hundred (100) cubic feet;

(d) shall not contain an amount of moisture at any time exceeding that corresponding to saturation at the natural temperature of the gas in the main pipe line at a point approximately fifty (50) feet in advance of Seller's meter inlet header and at the pressure at such point, and that the water shall not be present in liquid phase;

provided, that if Buyer or any purchaser from Buyer shall at any time be required by a duly constituted public regulatory authority to deliver to its customers gas containing less hydrogen sulphide and/or less total sulphur than above specified, Seller shall upon reasonable notice from Buyer cause the gas delivered hereunder to conform to such new requirement and the additional expense incurred by Seller in so doing, so far as such expense relates to the gas delivered hereunder, shall be borne one-half (½) by Seller, and one-half (½) by Buyer.

Section 8. That if the gas offered for delivery by Seller hereunder shall fail at any time to conform to any of the specifications hereinabove in clauses (a), (b) and (c) of Sec- [fol. 12-6] tion 7 of this Article set forth, then Buyer may at its option accept delivery of such gas and itself remove therefrom any solid matter, liquid matter, hydrogen sulphide and/or sulphur in any other form in excess of the amounts so specified in said Section 7, and Seller shall reimburse Buyer for any reasonable expense incurred by Buyer in effecting such removal, or for any reasonable expense otherwise incurred by Buyer by reason of the failure of the gas to conform to said specifications.

Section 9. That it will not at any time during the term hereof purchase or negotiate for the purchase of gas manufactured in any community or the environs thereof, or sell or negotiate for the sale of any gas to supply any person, firm or corporation located in any community or the environs thereof, in which community or environs gas is supplied to the general public by any of the public utility companies named in Section 2 of Article II hereof, or by any public utility company controlled by Middle West Utilities Company or Midland United Company, Delaware corporations, whose gas supply is procured directly or indirectly in whole or in part from Seller.

Section 10. That it will exercise reasonable care and diligence in the operation of its said pipe line and the equipment auxiliary thereto and will maintain and utilize the same in accordance with the best practice to avoid any interruption in or curtailment of the supply of gas to be delivered by it to Buyer; and that, if a temporary interruption in or curtailment of such supply shall become necessary in the operation of the pipe line, it will at once notify Buyer by telephone, telegraph or other prompt means of the nature, extent and probable duration of such temporary interruption or curtailment, and will promptly thereafter give Buyer like notice in writing by registered mail.

[fol. 12-7] Section 11. That it will and hereby does warrant generally the title to all gas delivered hereunder, and that it will indemnify Buyer and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas and/or to royalties, taxes, license fees or charges thereon, which are applicable before the title to the gas passes to Buyer.

Section 12. That Buyer shall have the right to sell the gas purchased by it hereunder to any public utility company and to purchasers for industrial purposes; that, in the event that any public utility company in the State of Illinois which may at any time be purchasing gas from Seller and which is not now controlled by any of the companies referred to in Section 9 of this Article shall come to be so controlled, or shall sell its property to any such company, Buyer may, at its option, undertake to supply such public

utility company, or the community or communities in which it theretofore operated, with gas purchased hereunder for the remaining term of such company's contract with Seller, in which event the said contract shall be cancelled, provided Buyer shall reimburse Seller for the actual cost less depreciation of any lateral line and/or equipment auxiliary thereto installed or purchased by Seller to serve such public utility company.

Section 13. That if natural gas shall hereafter be discovered in commercial quantities in a field or fields generally adjacent to the territory supplied by Buyer, and/or the purchasers of gas from Buyer, with gas purchased hereunder, unless Seller shall (a) either take such steps as may be necessary to acquire such supply of natural gas and deliver the same to Buyer hereunder; provided, that if the quality of such supply of natural gas is different from that specified in this contract, Buyer shall have agreed in writing to take and pay for the same; or (b) shall co-oper- [fol. 12-8] ate with Buyer in acquiring such supply for Buyer's use or for other disposition agreeable to Buyer; then Buyer may at its election purchase all or any part of such supply of natural gas and to the extent of the quantity so purchased shall, despite any provision of this contract to the contrary, be relieved from its obligations to Seller hereunder as then existing, except its obligation to pay a capacity charge on and after January 1, 1935, based upon a quantity of gas not less than one hundred thirty million (130,000,000) cubic feet of gas in a day.

Article II

Buyer agrees:

Section 1. That it will, during the period up to and including October 31st, 1936, purchase from Seller all of its natural gas requirements and/or all the natural gas requirements for any purpose of the companies named in Section 2 of this Article, (except the natural gas requirements of Western United Gas and Electric Company for its properties in the State of Illinois located south of an east and west line through Peoria, Illinois); up to and including a maximum amount of two hundred twenty-five million (225,000,000) cubic feet per day; that it will pay to Seller therefor at the price hereinafter in Section 1 of Article III hereof set forth; that on and after January 1st, 1935, it will

pay to Seller, as a minimum, a capacity charge (as more particularly defined in Section 1 of Article III hereof) based on a delivery hereunder of one hundred thirty million (130,000,000) cubic feet of gas in a day; that if pursuant to a request made by Buyer on or prior to March 1st in any year up to and including 1936 as provided in Section 4 of Article I hereof Seller shall make available or furnish [fol. 12-9] such pipeline capacity as will enable it to deliver the quantity of gas per day so requested by Buyer, Buyer will pay a capacity charge thereon commencing with and after the date on which Seller shall become obligated under the terms of Section 4 of Article I hereof to stand ready to deliver such requested quantity, or commencing with and after any later date, not more than fifteen (15) days thereafter, on which Seller shall first actually so stand ready, provided that if Seller shall fail so to stand ready to deliver such requested quantity of gas per day on the date specified therefor in Section 4 of Article I hereof, or within fifteen (15) days thereafter, but shall so stand ready within one (1) year from the date so specified, Buyer's obligation to pay a capacity charge on such requested quantity per day, so far as the same represents an increase over the capacity charge otherwise payable by Buyer, shall arise one (1) year from the date so specified.

Section 2. That it will procure and enter into contracts with The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company, Illinois corporations, for the sale and delivery to them of natural gas purchased by it hereunder, on such terms as will assure to it during the term hereof the revenue necessary to enable it to make when due the payments due from it to Seller hereunder; that Buyer's contract with each such company shall obligate such company to purchase from Buyer, or from one of the other purchasers from Buyer of gas received hereunder, all natural gas required by it for any purpose on any day on or prior to October 31, 1936, up to and including such quantity as, together with other natural gas purchased by Buyer from Seller on such day, will equal at least two hundred twenty-five million (225,000,000) cubic feet; except that there shall be excluded from the contract with Western [fol. 12-10] United Gas and Electric Company the natural

gas requirements of its properties in the State of Illinois located south of an east and west line through Peoria, Illinois; that it will provide the necessary mains and other facilities for the delivery to such companies of the gas purchased by it hereunder; that the contract of Buyer with each such company shall provide for payment by such company to Buyer for gas on such a basis that if at any time the earnings of Buyer thereunder and under like contracts entered into by Buyer for sale of gas purchased hereunder to other purchasers shall exceed a reasonable return upon the property used or held by Buyer in the carrying out of such contracts, the amount or amounts paid to Buyer by such purchasers for gas thereunder shall be so reduced that the earnings of Buyer thereunder shall not exceed such reasonable return; that Buyer's contract with each such company and with any other company to whom Buyer may for the purpose of resale at any time sell any part of the gas purchased hereunder shall contain a provision whereby such company shall guarantee to Seller the performance by Buyer of the terms, conditions and provisions of this contract to the following extent: each such company shall be obligated to Seller on its said guaranty for any month for that proportion of Buyer's obligations to Seller hereunder which such company's firm money obligation to Buyer for the purchase of gas under its said contract with Buyer in such month bears to the aggregate firm money obligations to Buyer of all of such companies for the purchase of gas in such month under their said contracts with Buyer; that if Buyer shall be in default for a period of thirty (30) days in the payment of any sum due from it to Seller hereunder, and shall continue to be in default for a further period of thirty (30) days after demand in writing by Seller for payment, each of said companies shall become obligated under [fol. 12-11] its said guaranty to pay directly to Seller its proportion, determined as above provided, of the amount or amounts then and from time to time thereafter due from Buyer to Seller hereunder; that each of said companies shall in its said contract with Buyer expressly consent to the provisions of this Section of this contract; and that the obligations of Seller hereunder shall be conditional upon the procuring by Buyer of such contracts with the three companies hereinabove named in this Section and the providing of transmission facilities as aforesaid; provided,

that any of such contracts may be modified at any time by agreement between Buyer and any such company in any respect except as to the said guaranty so long as Buyer is not thereby rendered unable to perform its obligations hereunder.

Article III

The parties hereto mutually covenant and agree as follows:

Section 1. The price to be paid by Buyer to Seller for gas purchased by Buyer hereunder in any month shall consist of the sum of a capacity charge, which shall be based upon Buyer's "maximum demand", as hereinafter defined, and a commodity charge. The quantities of gas which shall form the bases for such charges shall be those determined in accordance with Sections 2, 3 and 4 of this Article.

(a) For the purpose of determining Buyer's maximum demand, as applicable to any day during the period beginning with the date of first delivery of gas hereunder and ending February 29, 1932, there shall for each day of such period be deducted from the quantity of natural gas taken by Buyer in such day the quantity of natural gas, and/or the calculated equivalent, in natural gas of one thousand ten (1010) British thermal units per cubic foot, of any coke oven gas, which Buyer and/or purchasers of gas from [fol. 12-12] Buyer shall on that day (1) have used as boiler fuel in the operation of its or their steam plants or the steam plants of its or their subsidiaries, (2) have used in the underfiring of coke ovens operated by it or them, and/or (3) have sold for use as boiler fuel in the steam plants of central electric generating stations. The maximum quantity of any coke oven gas which shall be included in determining the amount of such deduction for any day up to and including December 31, 1931, shall be such a quantity thereof as is equivalent to twenty million (20,000,000) cubic feet in any day of natural gas of one thousand ten (1010) British thermal units per cubic foot, and from January 1, 1932, to and including February 29, 1932, shall be such a quantity as is equivalent to ten million (10,000,000) cubic feet in any day of such natural gas. As applicable to any given day of said period Buyer's maximum demand shall be defined as the largest daily quantity of gas so arrived at for that or any prior day of said period. The capacity

charge payable by Buyer for any month of said period shall be based upon the average of the maximum demands applicable to each of the several days of such month.

The commodity charge payable by Buyer for any month of said period shall be computed daily as follows: for all gas taken in any day up to but not exceeding the maximum demand applicable to such day the commodity charge shall be six cents ($.06) per thousand (1,000) cubic feet; and for all gas taken in any day in excess of the maximum demand applicable to such day the commodity charge shall be nine and seven tenths cents ($.097) per thousand (1,000) cubic feet.

(b) During the period from March 1, 1932 to October 31, 1932, inclusive, the capacity charge for any month shall be based upon Buyer's maximum demand applicable to February 29, 1932.

[fol. 12-13] The commodity charge payable by Buyer for any month of said period shall be computed daily as follows: for all gas taken in any day up to but not exceeding the maximum demand applicable to such day the commodity charge shall be six cents ($.06) per thousand (1,000) cubic feet; and for all gas taken in any day in excess of the maximum demand applicable to such day the commodity charge shall be nine and seven tenths cents ($.097) per thousand (1,000) cubic feet.

(c) During the period from and after November 1, 1932, Buyer's maximum demand as applicable to any day of such period shall be the largest daily quantity of gas taken by it from Seller on that or any prior day of said period and in any event not less than the maximum demand applicable to February 29, 1932. The capacity charge payable by Buyer for any month of said period shall be based upon the average of the maximum demands applicable to each of the several days of such month, but in no event shall the capacity charge payable on and after January 1, 1935, be based on a quantity of gas less than one hundred thirty million (130,000,000) cubic feet, as hereinbefore provided in Section 1 of Article II hereof.

The commodity charge payable by Buyer for any month of said period shall be six cents ($.06) per thousand (1,000) cubic feet of gas taken by Buyer hereunder in such month.

(d) The amount of the capacity charge hereinbefore in sub-section (a), (b) and (c) of this Section referred to shall,

for any month, be determined by applying to the quantity of gas hereinbefore defined as the basis for the capacity charge for such month a rate of five dollars and fifty-three and fifty-eight hundredths cents ($5.5358) per thousand (1,000) cubic feet.

(e) Buyer shall give Seller reasonable notice in each in-
[fol. 12-14] stance of its intention to deliver gas for the purposes specified in clauses (1), (2) and (3) in the first paragraph of sub-section (a) of this Section and Seller shall in each instance have the right to inspect, check and approve the meters and the measurement of gas to such customers and to examine and check the charts and other records pertaining to the measurement and determination of the average total heating value of such gas and at its option to have representatives present at all calibrations, adjustments and corrections of such metering or other equipment. Buyer shall furnish to Seller daily a statement showing the quantity and weighted average total heating value of such gas, if any, as may be used for the purposes specified in said clauses (1), (2) and (3) in the first paragraph of sub-section (a) of this Section.

(f) In the event of the failure or inability of Seller to deliver during any one or more days the amount of gas which Buyer desires to take, up to but not exceeding the maximum demand applicable to such day or days, then the quantity of gas representing the basis for the capacity charge for the month in which such day or days occur shall be reduced by a quantity equal to the quotient arrived at by dividing by the number of days in such month the aggregate of the differences between the quantities of gas delivered on such day or days and the quantities forming the bases for the capacity charges applicable to such day or days.

If during the period up to January 1, 1935, a reduction of the capacity charge in any month under the provisions of this sub-section (f) of this Section results from a failure or inability of Seller to deliver, for fifteen (15) or more consecutive days commencing between October 16th and the following February 13th, inclusive, or for sixty (60) or more consecutive days commencing between February 14th and the following October 15th, inclusive, such reduced ca-
[fol. 12-15] pacity charge shall be the monthly capacity charge thereafter until a larger capacity charge is estab-

lished by application of the provisions of sub-section (c) of this Section, or until Buyer is required by the terms of Section 1 of Article II hereof to pay a capacity charge based upon the delivery of one hundred thirty million (130,000,000) cubic feet per day. If on and after January 1, 1935, Seller shall fail or be unable for fifteen (15) or more consecutive days commencing between October 16th and the following February 13th, inclusive, or for sixty (60) or more consecutive days commencing between February 14th and the following October 15th, inclusive, to deliver the quantity of gas which Buyer desires to take, up to but not exceeding the maximum demands applicable to such days, (or up to one hundred thirty million (130,000,000) cubic feet if the maximum demand applicable to any of such days is less) the capacity charge then otherwise payable by Buyer shall be reduced to the extent of such failure or inability, as averaged over said days, but if by such reduction the basis for the capacity charge shall have been reduced to a quantity of gas less than one hundred thirty million (130,000,000) cubic feet, then upon Seller's again becoming able to make deliveries in the quantities desired by Buyer, Buyer shall resume the payment of a capacity charge based on a delivery of one hundred thirty million (130,000,000) cubic feet, or such larger quantity if any as shall thereafter be established as the basis of the capacity charge by application of the provisions of sub-section (c) of this Section.

(g) In the event of any failure or inability of Seller to deliver hereunder such quantity of gas as Buyer shall have a right to take, as a result of which failure or inability the stock of gas in the gas holders operated by the purchasers from Buyer of gas delivered hereunder shall be substantially [fol. 12-16] reduced, then Buyer shall have the right to take as soon as is convenient to Seller such quantities of natural gas as will replenish such holder stocks without by so doing increasing its maximum demand as theretofore established.

Section 2. The prices to be paid by Buyer for gas delivered hereunder as set forth in Section 1 of this Article are based upon the delivery of gas having an assumed but not guaranteed average total heating value at the point or points of delivery of one thousand ten (1010) British thermal units per cubic foot, and Seller shall use all reasonable efforts to conduct its operations in such a manner as will result in delivery of gas conforming to such standard.

Should the average total heating value of the gas delivered in any day be more than one thousand twenty (1,020) or less than one thousand (1,000) British thermal units per cubic foot, then for the purpose of, and before, determining Buyer's maximum demand, the quantity of such gas shall be increased or decreased, respectively, in the percentage by which the average total heating value of such gas is greater than one thousand twenty (1,020) or less than one thousand (1,000) British thermal units per cubic foot. Should the average total heating value of the gas delivered in any month be more than one thousand thirty-five (1,035) or less than nine hundred eighty-five (985) British thermal units per cubic foot, then for the purpose of, and before, applying the commodity charge, the quantity of such gas shall be increased or decreased, respectively, in the percentage by which the average total heating value of such gas is greater than one thousand thirty-five (1,035) or less than nine hundred eighty-five (985) British thermal units per cubic foot.

Section 3. (a) Seller shall furnish, install, operate and maintain in satisfactory working order and condition at its [fol. 12-17] own expense at each point of delivery of gas hereunder a measuring and regulating station, properly equipped with orifice meters and recording gauges or such other meter or meters as shall be mutually agreed upon by the parties hereto. The said meters at the principal point of delivery shall be read hourly and the readings and registrations of same shall serve as the basis for the hourly determination of the quantity of gas delivered at such point by Seller to Buyer. At all other points of delivery the meters shall be read daily.

(b) The measuring and regulating equipment, buildings and other facilities furnished and installed by Seller at the points of delivery of gas shall be and remain its property. Buyer shall have access to said measuring and regulating equipment at all reasonable hours, but the reading, calibrating, and adjusting thereof and the changing of charts shall be done only by employees or agents of Seller. Buyer shall have the right to be present, at its election, at the time of any installing, reading, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with Seller's meters and Seller shall advise Buyer of any such intended operations sufficiently in advance in order that Buyer may conveniently have its representative present.

Charts and records from Seller's measuring equipment shall remain the property of Seller. Upon request of Buyer, after Seller has completed its use thereof for billing purposes, it will submit to Buyer records and charts from its measuring equipment, together with calculations therefrom, for inspection and verification by Buyer subject to return by Buyer within ten (10) days after receipt thereof.

(c) Buyer may at its option and at its own expense install, operate and maintain check measuring equipment in housing similar to that provided by Seller for the housing of its own [fol. 12-18] measuring equipment, which equipment and housing if installed by Buyer shall be and remain its property. Such check meters shall be so installed as not to interfere with the operation of meters of Seller. In the event check measuring equipment is installed by Buyer, Seller shall have access to the same at all reasonable hours but the reading, calibrating, and adjustment thereof, and the changing of charts shall be done only by employees or agents of Buyer. Seller shall have the right to be present, at its election, at the time of any installing, reading, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with Buyer's meters and Buyer shall advise Seller of any such intended operations sufficiently in advance in order that Seller may conveniently have its representative present. Charts and records from said check measuring equipment, together with calculations therefrom, shall be available to Seller for inspection and verification subject to return within ten (10) days after receipt thereof.

(d) The total capacity of the gas measuring stations installed by Seller shall be sufficient to permit the testing and withdrawal of any individual meter from service without restricting the delivery of gas or interrupting the measurement of gas. The installation, maintenance, and operation of the regulating equipment shall be such as not to affect the accuracy of the gas volume determination made from either Seller's or Buyer's meters. The meter or meters of both Seller and Buyer shall be so located or protected as to assure freedom from pulsations, vibrations or surges at the meter or meters from any cause in so far as such protection is obtainable within practical limits mutually agreed upon to embody the best knowledge and information available.

(e) Either party hereto shall have the right to examine and [fol. 12-19] approve, or object to, the plans of the other for

the installation by it of said measuring equipment, and none of said installations shall be placed in service for the regulation or measurement of gas hereunder unless and until both parties are satisfied, or it shall be determined by arbitration hereunder, that such installation has been made in such manner as to permit of accurate determination of the quantity of gas to be delivered hereunder and to permit ready verification of the accuracy of measurement.

(f) If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(1) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(2) By using the registration of any check meter or meters if installed and accurately registering.

(3) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

(g) From time to time, and at least once each month, on a date as near the first of the month as practicable, the accuracy of Seller's measuring equipment shall be verified, at Seller's expense, in the presence of representatives of both Seller and Buyer and the parties shall jointly observe any adjustments which are made in such measuring equipment. If either party at any time shall notify the other [fol. 12-20] that it desires a special test of any meter, the parties shall co-operate to secure an immediate verification of the accuracy of the measuring equipment and joint observation of any adjustments. Each party shall give to the other notice of the time of all tests of meters sufficiently in advance of the holding of the tests in order that the other party may conveniently have its representative present.

(h) If upon any test any meter is found to be not more than two per cent (2%) fast or slow previous readings of such meter shall be considered correct in computing the vol-

ume of gas delivered by Seller to Buyer, but the meter shall at once be properly adjusted to record accurately. If upon any test, any meter shall be found to be inaccurate by an amount exceeding two per cent (2%) then any previous readings of such meter shall be corrected for any period which is definitely known and/or agreed upon, except that no such correction shall extend back over a period beginning more than one month prior to the time when such inaccuracy was first made known by either party to the other. In case the period of inaccuracy is not definitely known and/or agreed upon then the correction shall be for a period extending over one half of the time elapsed since the date of last calibration of the meter or meters, not exceeding a period of fifteen (15) days.

(i) The specific gravity of the gas delivered hereunder shall be determined by test by Seller at least once each day. Seller shall advise Buyer of the time at which specific gravity tests are to be made in order that Buyer may conveniently have its representative present. The Edward's type specific gravity balance or other equipment acceptable to both parties shall be used.

(j) So long as the gas delivered to Buyer hereunder at [fol. 12-21] the several points of delivery hereinafter referred to shall be acquired by Seller from a common source or sources the purity, as specified in Section 7 of Article I hereof, specific gravity and average total heating value of all of the gas delivered hereunder by Seller shall be considered to be those determined at the principal point of delivery.

Section 4. (a) The unit of measurement for the gas delivered under this agreement shall be one (1) cubic foot of gas of the quality and purity hereinbefore in Section 7 of Article I hereof set forth at a temperature of sixty degrees Fahrenheit (60° F) and an absolute pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch. The readings and registrations of the measuring equipment herein provided for shall be computed into such units of volume and determinations of average total heating value and of purity shall be in terms of such units of volume. The true physical characteristics of the gas which affect such computations, including deviations from Boyle's Law, shall be given each its due consideration, and the de-

termination of such physical characteristics shall be made in such manner, and with such apparatus, as is satisfactory to both parties, which shall be preferably in a manner and with apparatus approved by the United States Bureau of Standards.

(b) All fundamental constants, observations, records and procedures involved in determining and/or verifying the quantity and other characteristics of gas delivered hereunder shall, except as elsewhere specified herein, be in accordance with such standards therefor as are or may hereafter from time to time be approved and recommended by the American Gas Association, and in the absence of such standards, then such standards as are acceptable to the parties hereto.

Section 5. The total heating value of the gas delivered [fol. 12-22] hereunder shall be considered to be that determined at the principal point of delivery. Such determination shall be made hourly, and as nearly at the beginning of each hour as is practicable, by means of a Thomas recording calorimeter. The accuracy of the Thomas recording calorimeter shall be checked daily by means of a Junkers type of flow calorimeter operated according to the method of the United States Bureau of Standards. The Thomas and Junkers type calorimeters shall be installed, maintained and operated by and at the expense of Seller. If at any time the Thomas recording calorimeter is out of service or not operating properly for any reason, hourly determinations of total heating value shall be made with the Junkers calorimeter and these hourly determinations shall be used in computing averages. The Thomas recording calorimeter shall be deemed operating properly when its recorded total heating value does not vary from the total heating value as determined by the Junkers type of calorimeter by more than five (5) British thermal units per cubic foot of gas as herein defined. Buyer shall have the right to examine Seller's calorimeter equipment and test records at any reasonable hour and to be present at all tests and adjustments of such calorimeter equipment. The daily average total heating value of the gas delivered hereunder shall be calculated by weighting the several total heating values determined hourly as hereinabove provided in accordance with the respective quantities of gas to which such hourly total heating values are applicable and the monthly

average total heating value shall be calculated by weighting the several daily average total heating values during such month in accordance with the respective quantities of gas to which such daily average total heating values are applicable. Buyer may at its option and at its own expense install similar Thomas recording calorimeter equipment and [fol. 12-23] Junkers type of calorimeter for check purposes.

Section 6. Each party hereto shall preserve for a period of at least three (3) years all test data, charts and other records resulting from performance by it of the terms of this contract.

Section 7. As soon as practicable after the end of each month, Seller shall render to Buyer a bill for the gas delivered during such month, which shall include a statement of the amount of gas delivered in such month. Buyer shall pay such bill within fifteen (15) days after the receipt thereof. Any payment by Buyer shall not prejudice its right to adjustment of any bill to which it has taken or may within six (6) months after receipt thereof take exception. Any amount not paid when due shall bear interest at the rate of six per cent (6%) per annum from the due date thereof until paid. Upon failure by Buyer for a period of sixty (60) days to pay any amount due from it Seller may in addition to any other remedy it may have hereunder, or otherwise, suspend further delivery of gas until such amount is paid, and should such failure to pay continue for six (6) months, Seller shall have the right to terminate this contract and all of its obligations hereunder.

Section 8. Delivery of gas hereunder shall be made at the main line valve on the down-stream side of the outlet header at the "Joliet Regulating and Measuring Station" of Seller, located upon a site near the City of Joliet, Illinois, hereinbefore described, and at such other like meter station valves as may be installed at any other point or points along Seller's main pipe line at which Buyer may desire to take delivery of any portion or portions of the gas purchased hereunder. The point of delivery first above described is [fol. 12-24] sometimes referred to herein as the "principal point of delivery". Points of delivery other than the principal point of delivery may be selected as to general location by Buyer but the exact location thereof shall be mutually agreed upon by the parties with due regard to topo-

graphical features and availability of sites for regulating and measuring stations. Seller's main pipe line within the meaning of this Section shall include the twenty-four inch (24") pipe line hereinbefore referred to in Section 1 of Article I hereof and any branch line owned and controlled by it and in use for the purpose of supplying gas to purchasers of gas in northern Illinois and/or Wisconsin. Seller hereby grants to Buyer such an easement on, across, over and/or under such of Seller's property at its said Joliet Regulating and Measuring Station as may be necessary to permit Buyer to install, operate and maintain its own measuring and testing equipment with necessary piping and housing therefor and any necessary connections for transporting the gas purchased by it away from the said point of delivery.

Section 9. Title to the gas shall pass to Buyer at the point or points of delivery, hereinbefore specified, and thereafter sole responsibility and liability in relation thereto shall rest upon Buyer. Each party shall indemnify and save harmless the other party on account of any and all damages, claims or actions arising out of the maintenance or operation of the property and/or equipment of the indemnifying party, the points of delivery of the gas as hereinbefore specified to be the points of division of responsibility between the parties.

Section 10. The term "day" wherever used in this contract shall mean a period of twenty-four (24) consecutive hours beginning and ending at twelve o'clock noon standard time at the principal point of delivery. The term "month" [fol. 12-25] wherever used in this contract shall mean the period beginning at twelve o'clock noon standard time at the principal point of delivery on the first day of a calendar month and ending at twelve o'clock noon standard time at the said point of delivery on the first day of the next succeeding calendar month.

Section 11. Neither party shall be liable in damages to the other for any act, omission, or circumstance occasioned by or in consequence of any acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, storms, floods, washouts, fire, the elements, arrests and restraint of rulers and peoples, civil

disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs and/or alteration in machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas supply, the binding order of any court or government authority which has been resisted in good faith by all legal means and any other cause whether of the kind herein enumerated, or otherwise, not within the control of the party and which by the exercise of due diligence such party is unable to overcome; but such causes or contingencies affecting the performance of this contract by either party shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this contract by Buyer relieve it from its obligation to pay capacity charges in accordance with the provisions hereof or other amounts due from it hereunder.

Section 12. Seller shall in any event only be bound to [fol. 12-26] furnish natural gas to the full extent that it is able so to do through the exercise of reasonable care and diligence in procuring natural gas from the properties, wells and gas purchase contracts of Texoma and in the transportation thereof through its pipe line for such period of time as natural gas is reasonably available. In the event of a temporary deficiency in the supply of natural gas from any cause rendering Seller unable to meet the combined demands of the several purchasers of gas from it including Buyer, Seller shall to the best of its ability apportion such quantity of gas as it may have available for delivery among such purchasers in proportion to the respective maximum demands upon Seller theretofore established by them. In the event of a substantially total failure of delivery by Seller for an unreasonable time, Buyer shall have the right to terminate this contract.

Section 13. Should Seller at any time during the term hereof supply gas to any public utility company for use east of the Mississippi River, or for resale directly or indirectly to any public utility company for such use, at a rate which when applied to the entire quantity of gas taken by such purchaser in any month results in a lower price to such purchaser for such gas than the cost to such purchaser of such

gas if taken at the price set forth in Section 1 of this Article, Buyer shall have the right thereafter to purchase, at an equivalent rate, having regard to the maximum daily demand of and the quantity of gas taken by such other purchaser, all gas taken by it hereunder whether such rate is expressed in the form stated in this contract or otherwise.

Section 14. If at any time a difference of opinion shall arise between the parties hereto in regard to their respective rights, duties and obligations under such provisions of this contract as by their express terms may be referred to [fol. 12-27] arbitration, the question in dispute shall be referred to a Board of Arbitrators consisting of three (3) competent disinterested persons skilled in the particular matter which is the subject of dispute. The party desiring such arbitration shall give written notice thereof to the other party setting forth definitely therein the point or points in dispute, and shall in such notice name a person selected by it to act as one of the arbitrators. The other party shall within twenty (20) days after receipt of such notice name by notice to the first party a person to act as a second arbitrator. In the event that such other party shall fail within such twenty (20) day period to name a second arbitrator, the first party shall thereupon name the second arbitrator. The two (2) arbitrators chosen as above provided shall select the third arbitrator. If the said two (2) arbitrators shall be unable to agree upon a third arbitrator within twenty (20) days after their appointment, then such third arbitrator shall be named and selected by the person who at the time shall be the senior Judge, in point of service, of the United States District Court for the Eastern Division of the Northern District of Illinois, and application may be made to such Judge for such purpose by either or both of the arbitrators so chosen upon two (2) days' notice in writing to the parties hereto. The Board of Arbitrators so chosen shall immediately proceed to hear and determine the point or points in dispute, after giving to each party hereto not less than five (5) days' notice of the time and place of meeting; and at the time and place appointed they shall proceed summarily to hear and dispose of the point or points in dispute unless in their judgment the meeting should be adjourned to a later day or days, of which adjournment like notice shall be given unless such notice is waived by both parties hereto, in which case the

meeting may proceed at an earlier day. The determination [fol. 12-28] of such Board of Arbitrators, or a majority of them as to any point or points so submitted to them, shall be final and conclusive upon the parties hereto and said parties shall abide by such decision and perform the conditions thereof. All expenses connected with such arbitration, including a reasonable compensation to the arbitrators, shall be subject to the result of such arbitration and shall be borne and shared by the parties hereto, in such manner or in such proportion as the arbitrators shall award.

Section 15. There shall be no modification of the terms and provisions hereof except by the formal execution of supplementary written contracts.

Section 16. No waiver by either party of any one or more defaults by the other in the performance of any provision of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.

Section 17. All notices to be given hereunder by Seller to Buyer shall be delivered by registered mail addressed to Buyer's president at 122 South Michigan Avenue, Chicago, Illinois, and all notices to be given hereunder by Buyer to Seller shall be delivered by registered mail addressed to Seller's vice-president at 20 North Wacker Drive, Chicago, Illinois, or such other place as the parties may designate for the purpose.

Section 18. The date of first delivery of gas hereunder, as the term is used in this contract, shall mean the date upon which Seller first begins the regular and continuous delivery of gas. The date of first delivery of gas hereunder shall be endorsed on this agreement in the space provided therefor, by the executive officers of the respective parties [fol. 12-29] and such endorsement shall become a part of this contract as fully as if said date were recited herein.

Section 19. This contract shall be and continue in effect for a period of fifteen (15) years from the date of first delivery of gas hereunder and thereafter for a further period of five (5) years upon the same terms and conditions if Seller shall, at least two (2) years before the expiration of said fifteen (15) year period, give Buyer written notice of its election so to extend said period. In the event Seller

does not give such notice, Buyer shall have the refusal (which Buyer shall exercise within ninety (90) days after written notice to it) of that portion of any natural gas which Seller has available during said five (5) year period for delivery through its pipe line or pipe lines to Joliet or the other points of delivery hereunder, which bears the same proportion to the total gas so available which the quantity of gas forming the basis for the capacity charge then payable by Buyer bears to the total quantity of gas which Seller's pipe line is then capable of delivering per day at Joliet, Illinois, at the prices which Seller can then obtain and is willing to accept for such gas from any other responsible purchaser or purchasers.

Section 20. Either party may assign the rights and obligations hereof to a corporation which shall receive the assets of such assignor and obligate itself to carry out the provisions hereof binding on such assignor but otherwise neither party shall assign this contract or any of its rights hereunder unless it shall first have obtained the consent thereto of the other party.

In Witness Whereof the parties have hereunto set their hands and caused their corporate seals to be hereunto [fol. 12-30] affixed by their respective officers thereunto duly authorized, at Chicago, Illinois, as of the day and year first above written.

Continental Construction Corporation, by H. O. Caster, President. (Corporate Seal.)

Attest: C. C. Kelly, Secretary.

Chicago District Pipeline Company, by W. G. Rudd, Vice President. (Corporate Seal.)

Attest: Frank L. Griffith, Assistant Secretary.

Approved as to form:

Cooke, Sullivan & Ricks, by F. L. Daily.

This is to certify that the date of first delivery of gas under this contract is October 16, 1931.

Floyd C. Brown, Vice President of Continental Construction Corporation. George F. Mitchell, President of Chicago District Pipeline Company.

Dated this 2nd day of November, 1931.

[fol. 12-31] Whereas the foregoing contract between Continental Construction Corporation (therein called "Seller" and hereinafter so referred to) and Chicago District Pipeline Company (therein called "Buyer" and hereinafter so referred to), dated July 25, 1931, contemplates the re-sale by Buyer of gas purchased by it thereunder from Seller to the undersigned Illinois corporations, under contracts between Buyer and the undersigned corporations, in accordance with the provisions of Section 2 of Article II of the foregoing contract, and a guaranty to Seller by each of said corporations to the extent therein and hereinafter stated of the performance by Buyer of its obligations to Seller thereunder; and

Whereas such guaranties by the undersigned constitute the primary consideration for the execution by Seller of the said contract, and Seller has made its execution thereof conditional upon the procuring by Buyer of the execution of the following express agreement of guaranty by the undersigned; and

Whereas the execution of the said contract by Seller will enure to the benefit of the undersigned:

Now Therefore, in consideration of the execution of the said contract by Seller, the undersigned The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric [fol. 12-32] Company, Illinois corporations, hereby severally guarantee to Seller, its successors and assigns, the due and prompt performance by Buyer of its obligations to Seller under the said contract in accordance with the terms thereof, to the following extent: each of the undersigned corporations shall, and hereby agrees to, be obligated to Seller on the foregoing guaranty at any time during the term of the said contract for that proportion of Buyer's obligations to Seller thereunder which the firm money obligation of said corporation to Buyer for the purchase of gas under its contract with Buyer in the month with respect to which any amount is due bears to the aggregate firm money obligations of the three undersigned corporations to Buyer for the purchase of gas under their contracts with Buyer in such month; and the undersigned corporations severally agree, each for itself, that if Buyer shall be in default for a period of thirty (30) days in the payment of any sum due from it to Seller under its said contract with

Seller, and shall continue to be in default for a further period of thirty (30) days after demand in writing by Seller for payment, each of the undersigned corporations shall become obligated to pay directly to Seller its proportion, determined as above provided, of the amount or amounts then and from time to time thereafter due from Buyer to Seller under the said contract.

The undersigned hereby waive notice from Seller of any default by Buyer under its said contract with Seller, and agree that no delay or forbearance by Seller shall operate to relieve the undersigned in any way from their obligations hereunder.

In Witness Whereof the said corporations have hereunto set their hands and caused their respective corporate seals to be hereunto affixed by their proper officers thereunto [fol. 12-33] duly authorized, at Chicago, Illinois, as of the day and year first written in the said contract.

The Peoples Gas Light and Coke Company, by George F. Mitchell, President. (Corporate Seal.)

Attest: Albert L. Tossell, Secretary.

Approved as to form:

Cooke, Sullivan & Ricks, by F. L. Daily.

Public Service Company of Northern Illinois, by Britton I. Budd, President. (Corporate Seal.)

Attest: A. E. Patton, Secretary.

Approved as to form:

Isham, Lincoln & Beale.

Western United Gas and Electric Company, by George R. Jones, President. (Corporate Seal.)

Attest: J. T. Parsons, Assistant Secretary.

[fol. 13] EXHIBIT "B" TO COMPLAINT

Agreement Between Natural Gas Pipeline Company of America and Chicago District Pipeline Company

Dated December 31, 1935

Agreement of Forbearance

[fol. 13-1] This Agreement, made and entered into this 31st day of December, 1935, by and between Natural Gas Pipeline Company of America, a Delaware Corporation (hereinafter referred to as "Seller"), and Chicago District Pipeline Company, an Illinois Corporation (hereinafter referred to as "Buyer"):

Witnesseth:

Whereas, on July 25, 1931, a certain contract was made and entered into between Continental Construction Corporation, a Delaware Corporation, and Chicago District Pipeline Company, an Illinois Corporation, covering the sale and purchase of certain quantities of natural gas, which contract is hereinafter referred to as the "Natural Gas Sales Contract of July 25, 1931"; and

Whereas, the said Natural Gas Sales Contract of July 25, 1931 contemplates the resale by Buyer of the natural gas purchased by it under said contract from Seller, to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas & Electric Company, Illinois corporations, under contracts between Buyer and the said last named three corporations, and a certain guaranty to Seller by each of said last three named corporations, of Buyer's obligations, to the extent stated (which corporations when referred to jointly will be referred to herein as the "Guarantor Companies"); and

Whereas, the said Guarantor Companies did, on the 25th day of July, 1931, execute an instrument whereby they severally guaranteed to Seller, its successors and assigns, the due and prompt performance by Buyer of its obligations to Seller under said Natural Gas Sales Contract of July 25, 1931, in accordance with the terms thereof and to the extent therein stated, which instrument is hereinafter referred to as the "Contract of Guaranty of July 25, 1931"; and

Whereas, on or about the 10th day of September, 1931, the said Continental Construction Corporation above referred to, through appropriate action by its Board of Direc- [fol. 13-2] tors in amending its Certificate of Incorporation, changed its name to Natural Gas Pipeline Company of America; and

Whereas, under the provisions of the said Contract of Guaranty of July 25, 1931, the said Guarantor Companies did waive notice by Seller of any default by Buyer under its said contract with Seller, and agreed that no delay or forbearance by Seller should operate to relieve the said Guarantor Companies in any way from their obligations under the said Contract of Guaranty of July 25, 1931; and

Whereas, Buyer did pay to Seller all sums billed to it by Seller for natural gas delivered under said Natural Gas Sales Contract of July 25, 1931, from the beginning of deliveries of natural gas thereunder until January 1, 1935, but refused to pay to Seller a portion of the sums of money billed to it by Seller for gas so delivered in the month of January, 1935, and each month thereafter to the date hereof; and

Whereas, it is now the desire of the parties hereto that Seller shall, from and after January 1, 1935 for the consideration hereinafter referred to, forbear during the remainder of the term of the Natural Gas Sales Contract of July 25, 1931, to enforce against Buyer certain of the payments due under the said Natural Gas Sales Contract of July 25, 1931, to the extent hereinafter stated.

Now, therefore, for and in consideration of the premises and of the promises, covenants and agreements of the parties hereto and of the sum of One Dollar ($1.00) in hand paid by Buyer to Seller and of other good and valuable considerations, it is agreed as follows:

Article I

Seller agrees:

First. That from and after January 1, 1935, it will forbear to enforce against Buyer the terms and provisions of the said Natural Gas Sales Contract of July 25, 1931 to the [fol. 13-3] extent of the amount by which the capacity charge of five dollars and fifty-three and fifty-eight hundredths cents ($5.5358) per thousand (1,000) cubic feet of natural gas, provided for in sub-section (d) of Section 1

of Article III of the said Natural Gas Sales Contract of July 25, 1931, exceeds an amount of five dollars and twenty-five cents ($5.25) per thousand (1,000) cubic feet, with the same effect as if said sub-section (d) of Section 1 of Article III of said contract had in the first instance read as follows:

"(d) The amount of the capacity charge hereinbefore in sub-sections (a), (b) and (c) of this Section referred to shall, for any month, be determined by applying to the quantity of gas hereinbefore defined as the basis for the capacity charge for such month a rate of five dollars and twenty-five cents ($5.25) per thousand (1,000) cubic feet."

Second. That except as maximum demands larger than those mentioned below may from time to time actually be created by Buyer in accordance with the provisions of sub-section (c) of Section 1 of Article III of said Natural Gas Sales Contract of July 25, 1931, it will forbear to enforce against Buyer for each month of the year 1935 payment of a capacity charge based on any quantity of gas larger than one hundred ten million (110,000,000) cubic feet of gas per day, and for the month of January, 1936 and each month thereafter of the term of said Natural Gas Sales Contract of July 25, 1931, will forbear to enforce against Buyer a capacity charge based on any quantity of gas in excess of one hundred twenty million (120,000,000) cubic feet of gas per day, with the same effect as if Section 13 of Article I, Section 1 of Article II, and sub-section (c) and sub-section (f) of Section 1 of Article III of said Natural Gas Sales Contract of July 25, 1931, had in the first instance read as follows:

Section 13, Article I:

"That if natural gas shall hereafter be discovered in commercial quantities in a field or fields generally adjacent to the territory supplied by Buyer, and/or the purchasers of gas from Buyer, with gas purchased hereunder, unless [fol. 13-4] Seller shall (a) either take such steps as may be necessary to acquire such supply of natural gas and deliver the same to Buyer hereunder; provided, that if the quality of such supply of natural gas is different from that specified in this contract, Buyer shall have agreed in writing to take and pay for the same; or (b) shall co-operate with Buyer in acquiring such supply for Buyer's use or for

other disposition agreeable to Buyer; then Buyer may at its election purchase all or any part of such supply of natural gas and to the extent of the quantity so purchased shall, despite any provision of this contract to the contrary, be relieved from its obligations to Seller hereunder as then existing, except its obligation to pay a capacity charge for each month of the year 1935 based upon a quantity of gas not less than one hundred ten million (110,000,000) cubic feet of gas in a day, and, for each month of the year 1936 and of subsequent years, upon a quantity of gas not less than one hundred twenty million (120,000,000) cubic feet of gas in a day."

Section 1, Article II:

"That it will, during the period up to and including October 31st, 1936, purchase from Seller all of its natural gas requirements and/or all the natural gas requirements for any purpose of the companies named in Section 2 of this Article, (except the natural gas requirements of Western United Gas and Electric Company for its properties in the State of Illinois located south of an east and west line through Peoria, Illinois), up to and including a maximum amount of two hundred twenty-five million (225,000,000) cubic feet per day; that it will pay to Seller therefor at the price hereinafter in Section 1 of Article III hereof set forth; that for each month of the year 1935 it will pay to Seller, as a minimum, a capacity charge (as more particularly defined in Section 1 of Article III hereof) based on a delivery hereunder of one hundred ten million (110,000,000) cubic feet of gas in a day, and that for each month of the year 1936 and of subsequent years it will pay to Seller, as a minimum, a capacity charge (as so defined) based on a delivery hereunder of one hundred twenty million (120,000,000) cubic feet of gas in a day; that if pursuant to a request made by Buyer on or prior to March 1st in any year up to and including 1936 as provided in [fol. 13-5] Section 4 of Article I hereof Seller shall make available or furnish such pipeline capacity as will enable it to deliver the quantity of gas per day so requested by Buyer, Buyer will pay a capacity charge thereon commencing with and after the date on which Seller shall become obligated under the terms of Section 4 of Article I hereof to stand ready to deliver such requested quantity, or commencing with and after any later date, not more than fifteen

(15) days thereafter, on which Seller shall first actually so stand ready, provided that if Seller shall fail so to stand ready to deliver such requested quantity of gas per day on the date specified therefor in Section 4 of Article I hereof, or within fifteen (15) days thereafter, but shall so stand ready within one (1) year from the date so specified, Buyer's obligation to pay a capacity charge on such requested quantity per day, so far as the same represents an increase over the capacity charge otherwise payable by Buyer, shall arise one (1) year from the date so specified."

Sub-section (c), Section 1, Article III:

"During the period from and after November 1, 1932, Buyer's maximum demand as applicable to any day of such period shall be the largest daily quantity of gas taken by it from Seller on that or any prior day of said period and in any event not less than the maximum demand applicable to February 29, 1932. The capacity charge payable by Buyer for any month of said period shall be based upon the average of the maximum demands applicable to each of the several days of such month, but in no event shall the capacity charge payable for any month of the year 1935 be based upon a quantity of gas less than one hundred ten million (110,000,000) cubic feet, and in no event shall the capacity charge payable for any month of the year 1936 or of any subsequent year be based upon a quantity of gas less than one hundred twenty million (120,000,000) cubic feet as hereinbefore provided in Section 1 of Article II hereof."

"The commodity charge payable by Buyer for any month of said period shall be six cents ($.06) per thousand (1,000) cubic feet of gas taken by Buyer hereunder in such month."

Sub-section (f), Section 1, Article III:

"In the event of the failure or inability of Seller to de- [fol. 13-6] liver during any one or more days the amount of gas which Buyer desires to take, up to but not exceeding the maximum demand applicable to such day or days, then the quantity of gas representing the basis for the capacity charge for the month in which such day or days occur shall be reduced by a quantity equal to the quotient arrived at by dividing by the number of days in such month the aggregate of the differences between the quantities of gas deliv-

ered on such day or days and the quantities forming the bases for the capacity charges applicable to such day or days."

"If during the period up to January 1, 1935, a reduction of the capacity charge in any month under the provisions of this sub-section (f) of this Section results from a failure or inability of Seller to deliver, for fifteen (15) or more consecutive days commencing between October 16th and the following February 13th, inclusive, or for sixty (60) or more consecutive days commencing between February 14th and the following October 15th, inclusive, such reduced capacity charge shall be the monthly capacity charge thereafter until a larger capacity charge is established by application of the provisions of sub-section (c) of this Section, or until Buyer is required by the terms of Section 1, of Article II hereof to pay a capacity charge based upon the delivery of one hundred ten million (110,000,000) cubic feet of gas in a day during the year 1935 and one hundred twenty million (120,000,000) cubic feet of gas in a day during the year 1936 and of the subsequent years of this contract. If on and after January 1, 1935, Seller shall fail or be unable for fifteen (15) or more consecutive days commencing between October 16th and the following February 13th, inclusive, or for sixty (60) or more consecutive days commencing between February 14th and the following October 15th, inclusive, to deliver the quantity of gas which Buyer desires to take, up to but not exceeding the maximum demands applicable to such days (or up to one hundred ten million (110,000,000) cubic feet on any day during the year 1935 if the maximum demand applicable to such day is less, or up to one hundred twenty million (120,000,000) cubic feet on any day during the year 1936 or any subsequent year if the maximum demand applicable to such day is less), the capacity charge then otherwise payable by Buyer shall be reduced to the extent of such failure or inability, as aver- [fol. 13-7] aged over said days, but if by such reduction the basis for the capacity charge shall have been reduced to a quantity of gas less than one hundred ten million (110,000,000) cubic feet in the year 1935 and less than one hundred twenty million (120,000,000) cubic feet in the year 1936 and subsequent years, then upon Seller's again becoming able to make deliveries in the quantities desired by Buyer, Buyer shall resume the payment of a capacity charge based

on a delivery of one hundred ten million (110,000,000) cubic feet per day in the year 1935 and one hundred twenty million (120,000,000) cubic feet per day in the year 1936 and subsequent years, or such larger quantity if any as shall thereafter be established as the basis of the capacity charge by application of the provisions of sub-section (c) of this Section."

Third. That it will not claim against said Guarantor Companies payment for any of the sums of money forborne by this instrument.

Article II

Buyer agrees:

First. That it will pay to Seller, coincident with the execution of this agreement, that portion of the sums of monies which it has so withheld and refused to pay to Seller since January 1, 1935, as aforesaid, which is calculated by applying the provisions of this agreement as if the same had been executed on or prior to January 1, 1935, together with interest thereon from the respective dates of such withholdings to the date of payment, at the rate of six per cent (6%) per annum, and will, during the remainder of the term thereof, pay to Seller the sums of money due under the provisions of said Natural Gas Sales Contract of July 25, 1931, excepting only the sums of money so agreed to be forborne by Seller under the terms and provisions of this instrument.

Article III

The parties hereto mutually agree:

First. That the making of this agreement is an act which comes within the definition of a forbearance as that term is [fol. 13-8] used in the said Contract of Guaranty of July 25, 1931; and that nothing in this agreement or in the action of the parties in executing the same is understood by the parties to relieve the Guarantor Companies or any of them from any obligations which they or any of them may have under the said Contract of Guaranty of July 25, 1931, except to the extent that Buyer is or will be relieved hereby from any agreement or any obligations under the said Natural Gas Sales Contract of July 25, 1931.

Second. Nothing herein contained shall be construed in any respect to decrease, alter, change or amend any of the

obligations of Seller under the Natural Gas Sales Contract of July 25, 1931, it being the intention only that the payment of certain money obligations by Buyer set forth in the said Natural Gas Sales Contract of July 25, 1931 shall be forborne by Seller to the extent herein stated.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their proper officers thereunto duly authorized and their corporate seals to be affixed as of the day and year first above written.

Natural Gas Pipeline Company of America, by (Signed) Floyd C. Brown, Vice-President.

Attest: (Signed) S. E. Campbell, Secretary. (Corporate Seal.)

Chicago District Pipeline Company, by (Signed) Frank L. Griffith, Vice-President.

Attest: (Signed) Eskil I. Bjork, Assistant Secretary. (Corporate Seal.)

[fol. 13-9] The undersigned The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company, all Illinois corporations, being the parties signatory to a certain instrument dated July 25, 1931, sometimes heretofore referred to by said parties as a Contract of Guaranty, which said instrument was executed in connection with a certain contract, sometimes referred to as the Natural Gas Sales Contract of July 25, 1931, executed as of the same date by and between Natural Gas Pipeline Company of America, a Delaware corporation, and Chicago District Pipeline Company, an Illinois corporation, do hereby severally acknowledge to said two last named corporations that the action of said Natural Gas Pipeline Company of America in entering into a certain forbearance agreement by and between it and said Chicago District Pipeline Company dated December 31, 1935, with reference to the provisions of the Natural Gas Sales Contract of July 25, 1931, which relate to the amounts payable thereunder, is understood and construed by the undersigned to be an act which comes within the definition of a "forbearance" as that term is used in the aforesaid Contract of Guaranty, and that nothing in the said forbearance agreement dated December

31, 1935 or in the action of the parties thereto in executing the same is or will be understood by the undersigned to relieve the undersigned or any of them from any obligations which they or any of them may have under the said Contract of Guaranty, except to the extent that Chicago District Pipeline Company is or may be relieved by the said forbearance agreement dated December 31, 1935, from any obligations which it may have under the said Natural Gas Sales Contract of July 25, 1931.

Dated December 31, 1935.

[fol. 13-10] The Peoples Gas Light and Coke Company, by (Signed) George F. Mitchell, President.

Attest: (Signed) Albert L. Tossell, Secretary. (Corporate Seal.)

Public Service Company of Northern Illinois, by (Signed) Britton I. Budd, President.

Attest: (Signed) A. E. Patton, Secretary. (Corporate Seal.)

Western United Gas and Electric Company, by (Signed) George R. Jones, President.

Attest: (Signed) Murray D. Smith, Secretary. (Corporate Seal.)

[fol. 13a] EXHIBIT "C" TO COMPLAINT

ILLINOIS COMMERCE COMMISSION, STATE OF ILLINOIS

25218

ILLINOIS COMMERCE COMMISSION, on Its Own Motion

vs.

CHICAGO DISTRICT PIPE LINE COMPANY

Citation to Show Cause Why There Should Not be a Reduction in Rates Charged for Natural Gas to Distributing Companies in the State of Illinois

Citation

Whereas, it is the duty of this Commission, as a regulatory body, to institute investigations of the utilities under

its jurisdiction from time to time to determine whether the rates charged are just and reasonable; and

Whereas, the Chicago District Pipe Line Company supplies natural gas to Peoples Gas Light and Coke Company, Western United Gas and Electric Company, and Public Service Company of Northern Illinois at rates filed with this Commission pursuant to an order which specifically provided "that the consent herein should be granted with the express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipe Line Company;" and

Whereas, there is now pending before this Commission Case No. 24792, being The Peoples Gas Light and Coke Company in the matter of proposed advances in rates for [fol. 13b] gas service in Chicago, stated in Rate Schedule Ill. C. C. No. 19 rendered by said company; and

Whereas, one of the largest items of operating expense of said Peoples Gas Light and Coke Company is the cost of natural gas purchased by it from Chicago District Pipe Line Company being in excess of $10,000,000 per year; and

Whereas, Chicago District Pipe Line Company, Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company are all affiliates of Natural Gas Pipe Line Company of America which sells gas to Chicago District Pipe Line Company which it, in turn, resells to Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company; and

Whereas, a preliminary investigation of the records available to the Commission discloses that the charge for gas purchased by said Chicago District Pipe Line Company from Natural Gas Pipe Line Company of America is excessive and unreasonable; and

Whereas, the cost of gas sold to Chicago District Pipe Line Company by Natural Gas Pipe Line Company of America is the largest item of operating expense of said Chicago District Pipe Line Company; and

Whereas, the determination of the true operating income of Peoples Gas Light and Coke Company depends in part

upon the reasonableness of the charges to it for gas sold to it by Chicago District Pipe Line Company; and

[fol. 13c] Whereas, in the opinion of the Commission, the matters above recited constitute good cause why the rates of Chicago District Pipe Line Company should now be investigated and that company should be required to demonstrate that its present rates are not excessive and should not be reduced;

Now, therefore, be it resolved

That the Chicago District Pipe Line Company should be required to show cause if any there be why its rates charged for gas sold to operating companies should not be reduced.

It is therefore ordered that the Chicago District Pipe Line Company be and it is hereby cited to appear before the Commission at its offices in the City of Chicago, Illinois, Room 2600, 1 North LaSalle Street on the 15th day of December, 1936, at the hour of 10:00 A. M. Central Standard Time, to show cause if any there be why there should not be a reduction in rates charged by it for gas sold to operating companies in the State of Illinois.

By order of the Commission at Springfield, Illinois, this 17th day of November, A. D. 1936.

William W. Hart, Secretary. (Seal.)

[fol. 13d] ILLINOIS COMMERCE COMMISSION, STATE OF ILLINOIS

Certificate re 25218

I, William W. Hart, do hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

I further certify that the above and foregoing is a true, correct and complete copy of order made and entered of record by said Commission on the 17th day of November, A. D. 1936.

Given under my hand and the seal of said Illinois Commerce Commission at Springfield, Illinois, this 18th day of November, A. D. 1936.

William W. Hart, Secretary. (Seal.)

[fol. 13e] EXHIBIT "D" TO COMPLAINT

ILLINOIS COMMERCE COMMISSION, STATE OF ILLINOIS

25218

ILLINOIS COMMERCE COMMISSION, on Its Own Motion

vs.

CHICAGO DISTRICT PIPELINE COMPANY

Citation to Show Cause Why There Should Not be a Reduction in Rates Charged for Natural Gas to Distributing Companies in the State of Illinois

Interlocutory Order

By the COMMISSION:

This proceeding was begun by a citation issued by this Commission against the Chicago District Pipeline Company on November 17, 1936, ordering said company to appear and show cause, if any there might be, why there should not be a reduction in rates for gas sold at wholesale by said company to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company.

Hearing in this matter was set for December 15, 1936 and was continued on that date to December 18, 1936. No testimony was heard on that date and the case was again continued to January 13, 1937. On the last mentioned date the company presented two witnesses, Mr. William C. Rudd, Vice-president of the company, and Mr. Frank L. Griffith, Vice-president and Comptroller of the company. The case was then continued to January 20, 1937, on which date Mr. Frank L. Griffith testified further when the company closed its direct case. Since that time several hearings have been held at which counsel for the Commission has carried on cross examination of company witnesses.

[fol. 13f] It appears from the testimony in the record that Chicago District Pipeline Company is an Illinois corporation operating as a public utility engaged in the business of supplying gas at wholesale to three operating utility companies who are engaged in the business of supplying gas to consumers in the Chicago area.

The Chicago District Pipeline Company produces no gas but purchases and sells only natural gas which it receives from Natural Gas Pipe Line Company of America, taking delivery thereof at the terminus of a 24-inch pipe line from Texas to Joliet, Illinois.

The Natural Gas Pipe Line Company of America is an interstate pipe line operator, which transports natural gas from the fields located in the Panhandle district in Texas through its pipe line to a point located southwest of Joliet in Illinois, where it is delivered to Chicago District Pipeline Company.

The price which Chicago District Pipeline Company pays to said Natural Gas Pipe Line Company of America for this gas is determined by a contract between said Chicago District Pipeline Company and Natural Gas Pipe Line Company of America, which has been introduced in evidence in this case as Company Exhibit 2. It further appears from the record in this case in Company Exhibit 9 that the operating expenses of Chicago District Pipeline Company for 1936 were $12,818,713.89, of which amount the sum of $12,362,268.15 was paid to Natural Gas Pipe Line Company of America for gas purchased from said company under the terms of the contract referred to above.

In case Nos. 21261, 21262, 21263, 22386, 22387, and 22388, consolidated, testimony on behalf of the respondent here was introduced as to estimated profits of Natural Gas Pipe [fol. 13g] Line Company of America from said business, and as to the actual profits earned by said company to February, 1932. On the basis of the evidence in those cases the Commission allowed Chicago District Pipeline Company to file the schedule of rates (Company Exhibit 8), which is the subject of investigation here. After three full years of operation under the present arrangement it is now imperative that the Commission be advised as to the experience of these companies with respect to the transactions between them.

It appears from the record that the stock of Natural Gas Pipe Line Company of America is owned and held by six corporations in varying percentages, with Natural Gas Investment Company owning 26.6 per cent of that stock. It further appears that 79.54 percent of the stock of Natural Gas Investment Company is owned by The Peoples Gas Subsidiary Company, a wholly owned subsidiary of The

Peoples Gas Light and Coke Company. The stock of Chicago District Pipeline Company, respondent here, is entirely owned by Natural Gas Investment Company.

It further appears from the record that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company, and also that H. P. Sedwick, one of the Directors of Chicago District Pipeline Company, is also a Vice-President and Director of Natural Gas Pipe Line Company, and a Director of Natural Gas Investment Company.

Section 8a of "An Act concerning public utilities," in force July 1, 1921, as amended, provides (Par. 2):

[fol. 13h] "The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section the phrase 'affiliated interests' means:

"* * * (c) Every corporation, 10 per centum or more of whose voting capital stock is owned by any person or corporation owning 10 percentum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of 10 percentum or more of voting capital stock; * * * (f) Every corporation which has one or more elective officers, or one or more directors in common with such public utility; * * *"

Therefore, the Commission having considered the evidence which has up to now been introduced in this cause is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this proceeding and of the parties involved herein;

(2) that Chicago District Pipeline Company is a public utility under the jurisdiction of this Commission engaged in the business of supplying gas at wholesale to privately owned retailing public utility companies;

(3) that Natural Gas Pipe Line Company of America carries on certain transactions with said Chicago District Pipeline Company, to-wit: the sale of gas by said Natural Gas Pipe Line Company of America to Chicago District Pipeline Company under the terms of a contract dated July 25, 1931 and certain agreements supplemental thereto;

(4) that 26.62 per cent of the stock of said Natural Gas Pipe Line Company of America is owned by Natural Gas Investment Company; that 100 percent of the stock of Chicago District Pipeline Company is owned by said Natural Gas Investment Company;

(5) that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company of America;

[fol. 13-i] (6) that H. P. Sedwick is a Director of both Chicago District Pipeline Company and Natural Gas Investment Company and a Vice President and Director of Natural Gas Pipe Line Company of America;

(7) that by virtue of said common ownership of stock and said common directors said Natural Gas Pipe Line Company of America is an affiliate of Chicago District Pipeline Company within the meaning of Section 8a of "An Act concerning public utilities", in force July 1, 1921, as amended;

(8) that Ralph W. Gallagher, then Director of Continental Construction Company (the name of which was later changed to Natural Gas Pipe Line Company of America) was called as a witness by Chicago District Pipeline Company and that he testified as to estimated investment, expenses and earnings of the pipe line project; and that Frank L. Griffith, then Assistant Secretary of Chicago District Pipeline Company and Natural Gas Investment Company, now director and Vice-President and Director, Vice-president and Comptroller of those companies, respectively,

sponsored an exhibit purporting to show the earnings, expense and investment of Natural Gas Pipe Line Company of America as of February 29, 1932;

(9) that it is now imperative that the Commission be advised as to the actual experiences of said Natural Gas Pipe Line Company of America and Chicago District Pipeline Company in respect to the sale of gas to the latter by the former; that the said Natural Gas Pipe Line Company of America should be required to submit reports with respect to such transactions and that the said Natural Gas Pipe Line Company of America should make available to the Commission all accounts and records relating to said transactions, including any accounts and records, any portion of which may be applicable to such transactions.

It is Therefore Ordered by the Illinois Commerce Commission that Natural Gas Pipe Line Company of America be, and the same is hereby ordered and directed to file forthwith in this proceeding on or before the Fifteenth (15th) day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipe Line Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and [fol. 13-j] a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

It is Further Ordered that the said Natural Gas Pipe Line Company of America make available for the examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipe Line Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions.

By order of the Commission at Springfield, Illinois, this Third (3rd) day of March, A. D. 1937.

(Signed) William W. Hart, Secretary. (Seal.)

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR PRELIMINARY INJUNCTION AND FOR THE ORGANIZATION OF A THREE JUDGE COURT AS PROVIDED BY SECTION 266 OF THE JUDICIAL CODE.—Filed March 19, 1937

To the Honorable Judges of the District Court of the United States, for the Northern District of Illinois:

Upon bill of complaint herein, verified on the 11th day of March, A. D. 1937, and upon the proceedings had and to be had herein, the Natural Gas Pipeline Company of America, a corporation, the plaintiff above named, makes application to Your Honors for a writ of injunction enjoining and restraining, pending the final judgment in this action, and until further order of this court, the defendants and each of them, and their and each of their officers, agents, servants and employees, and any and every person acting under and by virtue of the authority of the order of the Illinois Commerce Commission of the State of Illinois, dated March 3, 1937, and the Public Utilities Act of the State of Illinois, each referred to and described in said bill of complaint, and any other law of the State of Illinois, insofar as any of said laws relates or provides for the enforcement of said order of Illinois Commerce Commission, dated March 3, 1937, from in any way enforcing or attempting to enforce the provisions of said order of Illinois Commerce Commission, dated March 3, 1937, against the plaintiff herein, and from bringing any action thereon to recover or enforce the fines and penalties imposed by said Public Utilities Act for violation or nonobedience of the orders of the Illinois Commerce Commission, and from taking any other action directly or indirectly to enforce said order of March 3, 1937; and plaintiff prays Your Honors to call to Your Honors' assistance to hear and determine this application, two other judges in accordance with the provisions of Section 266 of the Judicial Code [fol. 15] of the United States, and to expedite the hearing of this application, and set the same down for hearing at the earliest practical date; and for such other and further relief as to the Court may seem just and proper in the premises.

And the plaintiff shows Your Honors that it appears by the allegations of said bill of complaint that immediate and irreparable damage will be caused to said plaintiff unless a temporary restraining order is issued until the hearing of this application for an interlocutory injunction; and it is further prayed that said defendants be enjoined and restrained from enforcing said order of March 3, 1937 and from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalties or any other remedy for disregarding said order, and from taking any other action, directly or indirectly, to enforce said order of March 3, 1937 in any manner or degree until said hearing on said application for an interlocutory injunction.

Dated March 19, 1937.

Natural Gas Pipeline Company of America, a Corporation, by Sidley, McPherson, Austin & Burgess, 11 S. LaSalle Street, Chicago, Illinois, Its Attorneys. J. J. Hedrick. Donald F. McPherson. Howard Neitzert.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ORGANIZING A THREE JUDGE COURT UNDER SECTION 266 OF THE JUDICIAL CODE—March 19, 1937

This cause came on to be heard upon the motion of Natural Gas Pipeline Company of America, a corporation, the plaintiff in the above entitled cause, for an interlocutory injunction against James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr, the persons constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General of the State of Illinois, defendants in the above cause;

And it appearing to this court that said bill of complaint seeks an interlocutory injunction restraining the enforcement and execution of a certain order of the Illinois Commerce Commission and a part of the Public Utilities Act of the State of Illinois, each described in said bill of complaint, by restraining the acts of James M. Slattery, Andrew Olson,

Charles E. Byrne, James D. Marnane and Harry A. Barr, the persons constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General [fols. 17-22] of the State of Illinois, in the enforcement of such order and said Public Utilities Act upon the ground of the unconstitutionality of such order and statute, as provided by Section 266 of the Judicial Code.

It is ordered, adjudged and decreed as follows:

1. The Honorable William H. Holly, Judge of the above Court, hereby calls to his assistance to hear and to determine the application for an interlocutory injunction in this cause the Honorable Will M. Sparks, Judge of the Circuit Court of Appeals for the Seventh Circuit, and the Honorable John P. Barnes, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division.

2. It is further ordered, adjudged and decreed that said defendants appear and show cause, if any they have, on Apl. 8th, 1937, why an interlocutory injunction should not issue as prayed for in said bill of complaint.

3. And it appearing to the Court that the defendants, by and through their attorneys, have stipulated and agreed with the Court and with the plaintiff that no steps or proceedings will be taken by said defendants against the plaintiff, its officers, directors, agents or employees, to enforce said order of Illinois Commerce Commission, dated March 3, 1937, or to enforce any penalties or any other remedy for disregarding said order until said hearing on said application for an interlocutory injunction, and that said defendants have further stipulated and agreed to take no other action, directly or indirectly, to enforce said order of March 3, 1937 in any manner or degree until said hearing on said application for an interlocutory injunction, the motion of the plaintiff for a temporary restraining order pending said hearing is hereby denied.

Dated March 19, 1937.
Enter:

William H. Holly, District Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL ANSWERS OF JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE AND HARRY A. BARR, THE PERSONS WHO PRESENTLY CONSTITUTE THE ILLINOIS COMMERCE COMMISSION OF THE STATE OF ILLINOIS AND OTTO KERNER, ATTORNEY GENERAL OF THE STATE OF ILLINOIS—Filed April 6, 1937

These defendants and each of them for answer to the bill of complaint of the plaintiff in the above entitled cause say:

1. Admit the allegations in paragraph one of the bill of complaint.

2. Admit the allegations in paragraph two of the bill of complaint.

3. Admit that this is a suit of a civil nature between citizens of different states brought for the purpose of enjoining the enforcement of a certain order of the Illinois Commerce Commission, dated March 3, 1937, but deny that this suit arises under the Constitution or the laws of the United States of America, and deny that the value of the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars, and therefore state that this Court should refuse to take jurisdiction of this cause.

4. Admit that the plaintiff is engaged in the sale, trans- [fol. 24] portation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the States of Kansas, Nebraska, Iowa and Illinois, but allege that not less than 85 per cent of such natural gas is sold and delivered to distributors and consumers thereof in the State of Illinois; admit that such natural gas is transported from said point or points in the State of Oklahoma to said consumers or distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of pipelines and pumping stations; admit that plaintiff is engaged in interstate commerce, but

deny that its business and commerce is national in character; deny any knowledge or information as to whether or not the plaintiff is or is not engaged in intrastate commerce within the State of Illinois; admit that the plaintiff has not qualified to do an intrastate business within the State of Illinois under the terms and provisions of the laws of said state; allege that plaintiff is a public utility as is shown by its operations and its certificate of incorporation, a certified copy of which is attached hereto as Exhibit 1; allege that plaintiff is an "affiliated interest" of a public utility under the jurisdiction of the Illinois Commerce Commission within the meaning of Section 8a of "An Act concerning public utilities," approved June 29, 1921, as amended, being one of the laws of the State of Illinois; chapter 111a, Ill. State Bar Stats. 1935, hereinafter referred to as the Public Utilities Act, and that said Section 8a is applicable to plaintiff and that plaintiff is subject to its provisions.

5. Admit the allegations of paragraph five of the bill of complaint.

6. Admit the allegations of paragraph six of the bill of complaint.

7. Admit the allegations of paragraph seven of the bill of complaint.

8. Admit that plaintiff was not an original party to said citation or said proceedings against the Chicago District [fol. 25] Pipeline Company, but allege that the plaintiff was made and became a party to said citation and proceedings by virtue of the said order of March 3, 1937, made and entered by the Illinois Commerce Commission, a copy of which is set forth as Exhibit D in plaintiff's bill of complaint, which order was entered for the reasons therein set forth; allege that the service of said order upon the plaintiff constituted notice to the plaintiff and that the plaintiff is afforded an opportunity to be heard with respect to said order by virtue of a certain provision of Section 65 of the Public Utilities Act which provision is in words and figures as follows:

"• • • With respect to any rules, regulations, decisions or orders which the commission is authorized to issue without a hearing, and so issues, any public utility or other

person or corporation affected thereby and deeming such rules, regulations, decisions or orders, or any of them, improper, unreasonable or contrary to law, may apply for a hearing thereon, setting forth specifically in such application every ground of objection which the applicant desires to urge against such rule, regulation, decision or order. The commission may in its discretion, grant or deny the application, and a hearing, if had, shall be subject to the provisions of this and the preceding sections."

9. Deny the allegation that the Chicago District Pipeline Company and the plaintiff are not now subject to common control through common stock ownership or in any other manner; admit all of the other allegations of paragraph 9 of the bill of complaint but allege that on July 25, 1931, when the contract between the plaintiff, then known as Continental Construction Corporation, and the Chicago District Pipeline Company was entered into, a copy of which contract is set for[illegible] as Exhibit A to plaintiff's bill of complaint, and prior thereto during the negotiations leading to the construction of said pipeline project and the execution of said contract, there was a common interest in said pipeline project between Chicago District Pipeline Company and the distributing companies, namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company on the one hand, and plaintiff and persons or corporations owning or controlling stock or other securities of the said plaintiff and gas acreage used to supply gas by said plaintiff, on the other, by reason of stock holding, [fol. 26] interlocking directorates and business understandings between said corporations and persons controlling or representing said corporations. Allege that no pipeline company other than plaintiff operates in or near the territory served by said Chicago District Pipeline Company. Allege that the agreement of forbearance executed by and between plaintiff and said Chicago District Pipeline Company on or about December 31, 1935 furnishes no safeguard or guaranty of the reasonableness of the price of gas sold to said Chicago District Pipeline Company by said plaintiff so as to warrant the use of said price as a test of the reasonableness of the operating expenses of said Chicago District Pipeline Company. Allege that The Peoples Gas Light and Coke Company in a proceeding now pending before the Il-

linois Commerce Commission docketed as No. 24792 by said Commission is seeking an increase of approximately 16 per cent in the rates charged by it for gas sold to consumers in the City of Chicago. Allege that the item of payment for natural gas purchased from Chicago District Pipeline Company is substantially more than 40 per cent of the total operating expenses of said The Peoples Gas Light and Coke Company. Allege that in order that said Illinois Commerce Commission might make a complete and proper investigation and determination of the rates and operating expenses of The Peoples Gas Light and Coke Company and Chicago District Pipeline Company, said Illinois Commerce Commission must determine the reasonableness of said payments by said The Peoples Gas Light and Coke Company to Chicago District Pipeline Company and by said Chicago District Pipeline Company to said plaintiff for natural gas purchased from it. Allege that such investigation and determination requires an investigation into the reasonableness of payments received by plaintiff herein by reason of the common interest hereinbefore alleged, and Section 8a of the Public Utilities Act provides the lawful and proper means for securing the information necessary to make such determination.

10. Deny any knowledge or information as to whether the affairs of the plaintiff and of the Chicago District Pipeline Company are controlled by their respective boards of directors and officers; admit that at the time of the negotiation for and the execution of the said contract of July 25, [fol. 27] 1931, the board of directors of the plaintiff corporation consisted of eight members and that said board has subsequently been enlarged to include nine members; deny any knowledge or information as to the number of members of the board of directors of the plaintiff corporation representing Natural Gas Investment Company or Insull, Son and Co. Inc. at any of the times mentioned in the bill of complaint, but allege that at all of the times mentioned in said bill of complaint the said Natural Gas Investment Company or Insull, Son and Co. Inc., Chicago District Pipeline Company and plaintiff corporation had two directors in common; deny any knowledge or information as to whether Natural Gas Investment Company, Insull, Son and Co. Inc., or any other of the corporations named in paragraph 9 of the bill of complaint have ever controlled or attempted to control said

board; deny upon information and belief the allegation that at none of the times mentioned in the bill of complaint was there any common control of the boards of directors of the plaintiff and of the Chicago District Pipeline Company; admit that since the date of plaintiff's incorporation one of the members of plaintiff's board of directors representing Natural Gas Investment Company or Insull, Son and Co. Inc. has been elected vice-president of Natural Gas Pipeline Company of America, but deny any knowledge or information as to whether said vice-president ever exercised any function of said office or took any part in the control or management of plaintiff's business or affairs as such officer or whether said vice-president received any compensation as vice-president; deny any knowledge or information as to whether since February 9, 1937, any of the directors representing Natural Gas Investment Company has been an officer of Natural Gas Pipeline Company of America.

11. Deny that the Illinois Commerce Commission pro- [fol. 28] poses, threatens or intends to regulate, supervise or control the contracts, rates or other affairs of the plaintiff, and deny that the attorneys, agents or representatives of the Illinois Commerce Commission or any of them have so stated; admit that the Illinois Commerce Commission proposes to exercise jurisdiction and control over the plaintiff to the extent authorized in Section 8a of the Public Utilities Act in the manner provided for in the order of the Illinois Commerce Commission entered on March 3, 1937; admit that for the purpose of exercising such jurisdiction and control the Illinois Commerce Commission proposes to inquire into the earnings, expenses and profits of the plaintiff, the value of its property and investments and the other business affairs of the plaintiff in so far as such earnings, expenses and profits and value of properties and investments and other business affairs relate to transactions with Chicago District Pipeline Company; admit that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Company and the Natural Gas Pipeline Company of America as affiliated corporations within the meaning of Section 8a of the Public Utilities Act, but deny that it is the intention of said Illinois Commerce Commission to regulate the business affairs of said corporations as a single enterprise under

the jurisdiction of said Illinois Commerce Commission or to take jurisdiction of and regulate the profits or income of the plaintiff; admit that it is the intention of the said Illinois Commerce Commission to exercise all power, control and dominion over the plaintiff which has been granted to said Illinois Commerce Commission by Section 8a of said Public Utilities Act.

12. Allege that the Illinois Commerce Commission is authorized, empowered and directed to inquire into, investigate and require the disclosure of the earnings, expenses and profits of the plaintiff and the value of its properties [fol. 29] and investments and the other business and affairs of the plaintiff in so far as such earnings, expenses or profits or the value of plaintiff's properties or investments or its other business or affairs relate to transactions with the Chicago District Pipeline Company; allege that the Public Utilities Act and particularly Section 8a thereof does apply to the plaintiff company, and deny that said act is wholly or in part null and void in so far as it confers upon the Commission jurisdiction and authority over the plaintiff, its officers or agents, and the plaintiff's business, books, records, contracts and affairs; allege that the Illinois Commerce Commission is authorized, empowered and directed to require the plaintiff to file with said Illinois Commerce Commission a report as to the cost of the property of the plaintiff which is used in supplying natural gas to said Chicago District Pipeline Company; allege that the Illinois Commerce Commission is authorized, empowered and directed to require the plaintiff to file a statement of the income and expenses of the plaintiff in connection with supplying gas to said Chicago District Pipeline Company; allege that the Illinois Commerce Commission is authorized, empowered and directed to require the plaintiff to make available for examination by said Illinois Commerce Commission or its officers, agents and employes, any of its accounts or records relating to transactions between said Natural Gas Pipeline Company of America and Chicago District Pipeline Company, including accounts and records as to joint or general expense, any portion of which may be applicable to said transactions; allege that the order of the Illinois Commerce Commission, dated March 3, 1937, is valid and enforceable.

13. Deny that said order of March 3, 1937, and Section 8a of said Public Utilities Act or either of them deprive the [fol. 30] plaintiff of property without due process of law or deny to the plaintiff the equal protection of the laws or subject plaintiff's books, records, papers or effects to unlawful searches and seizures; deny that said order and said section of said Public Utilities Act or either of them are in violation of or prohibited by the Constitution of the United States of America.

14. Deny that if the Illinois Commerce Commission is permitted to enforce said order of March 3, 1937, complained of by the plaintiff, said plaintiff will suffer unlawfully any inconvenience or expense or that its trade secrets, secret processes or methods of doing business will be exposed to its competitors or any other persons, or plaintiff's credit will be impaired or plaintiff will be hampered or hindered in its commerce or business affairs or any other fashion, if there is any, or will suffer any harm or injury; allege that the order of the Illinois Commerce Commission, dated March 3, 1937, the Public Utilities Act and Section 8a thereof, are valid and enforceable under the provisions of the Constitution of the State of Illinois; deny that enforcement of the order of the Illinois Commerce Commission, dated March 3, 1937, would burden, obstruct or hamper in any fashion whatsoever the carrying on of interstate commerce by the plaintiff; allege that the order of the Illinois Commerce Commission, dated March 3, 1937, entered under the authority of the Public Utilities Act and Section 8a thereof is a proper and necessary exercise of the police power of the state in regulating persons engaged in operation of public utilities in said state.

15 and 16. Allege that under the provisions of Section 65 of the Public Utilities Act set forth hereinbefore and Sections 63 et seq., providing for a review of commission action [fol. 31] by the courts of the state of Illinois, the plaintiff has been provided with a complete and adequate remedy at law for determining the validity of said order and Section 8a of the Public Utilities Act.

Allege that by virtue of Section 76 of said Public Utilities Act before any penalty could be assessed against said plaintiff for failure or refusal to comply with the order of

said Illinois Commerce Commission dated March 3, 1937, or said Public Utilities Act, said plaintiff would have a full hearing before a court at which time said plaintiff would have an opportunity to attack the validity of said act or any portion thereof, or the validity of said order of March 3, 1937.

Wherefore the defendants deny that the plaintiff is entitled to the relief prayed for in the bill of complaint or any part thereof, and pray that the bill of complaint be dismissed with costs.

James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General of the State of Illinois, by (Sgd.) Otto Kerner, Attorney General of the State of Illinois, Attorney for Defendants. Montgomery S. Winning, James G. Skinner, Harry R. Booth, W. Robert Ming, Jr., Eugene L. Cohn, Lewis J. Freehof, Assistant Attorneys General, of Counsel.

[fol. 32] *Duly sworn to by James M. Slattery. Jurat omitted in printing.*

[fol. 33] Copy

EXHIBIT 1 TO ANSWER

Certificate of Incorporation of Continental Construction Corporation

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of 1915, and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Continental Construction Corporation.

Second. The principal office of the corporation is to be located in the City of Dover, in the County of Kent, in the State of Delaware. The name of its resident agent is the

United States Corporation Company, whose address is No. 19-21 Dover Green in said city.

Third. The nature of the business of the corporation and the objects or purposes proposed to be transacted, promoted or carried on by it, are as follows, to wit:

To plan, devise, construct, build, erect, purchase, or otherwise acquire, improve, equip, repair, maintain, manage, operate, deal in, sell, demolish and otherwise dispose of and turn to account, any and all kinds of buildings, pipelines, transmission lines, distribution lines, plants, works, factories, structures, stores, warehouses, machines and machinery of all kinds, mains, pipes, conduits, ducts, services, [fol. 34] terminals, storage plants and equipment, installations, appliances and appurtenances of every kind and description connected with, incidental to, necessary, suitable, useful, convenient or appertaining to the carrying on of the businesses or any of them herein referred to;

To store, transport, buy and sell oil, gas, salt, brine, and other mineral solutions, and to produce oil and gas; with the right, power and authority to purchase, own, lay, construct, maintain and operate all such wells, pipelines, tanks, pumps, stations and all other property and facilities of whatever nature necessary or convenient to such business, and to exercise all other powers and rights as are incidental thereto;

To purchase, acquire, obtain by contract, concession or otherwise, condemn and/or exercise the right and/or power of eminent domain wherever the same may be permitted by law with respect to, take, hold, own, develop, improve, operate, lease, enjoy, control, manage or otherwise turn to account, mortgage, grant, sell, exchange, deal in, convey or otherwise dispose of any and all kinds of lands, real property, leases, concessions, licenses, immunities, powers, privileges, grants, rights-of-way, land patents, franchises, easements, tenements, hereditaments and interests of every description and nature whatsoever;

To manufacture, buy, sell, deal in, and to engage in, conduct and carry on the business of manufacturing, buying, selling and dealing in goods, wares and merchandise of every class and description;

To borrow money, and to make and issue notes, bonds, debentures, obligations and evidences of indebtedness of all kinds, whether secured by mortgage, pledge or otherwise,

[fol. 35] without limit as to amount, and to secure the same by mortgage, pledge or otherwise upon the whole or any part of the property of the corporation; and generally to make and perform agreements and contracts of every kind and description;

To apply for, obtain, register, purchase, lease or otherwise to acquire and to hold, own, use, develop, operate and introduce, and to sell, assign, grant licenses or territorial rights in respect to, or otherwise to turn to account or dispose of, any copyrights, trade marks, trade names, good will, brands, labels, patent rights, letters patent of the United States or of any other country or government, inventions, improvements and processes, whether used in connection with or secured under letters patent or otherwise;

To acquire by purchase, subscription or otherwise, and to hold for investment or otherwise and to use, sell, assign, transfer, mortgage, pledge or otherwise deal with or dispose of stocks, bonds or any other obligations or securities of any corporation or corporations, association or associations; to merge or consolidate with any corporation in such manner as may be permitted by law; to aid in any manner any corporation whose stocks, bonds or other obligations are held or in any manner guaranteed by this corporation, or in which this corporation is in any way interested; to aid in any manner which shall be lawful and to guarantee the contracts and obligations of any person, firm, corporation or association in whom or in which this corporation is in any way interested; and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such pur-
[fol. 36] pose; and while owner of any such stock, bonds or other obligations to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting powers thereon; to guarantee the payment of dividends upon any stock, or the principal or interest or both, of any bonds or other obligations, and the performance of any contracts;

To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in association with other corporations, firms or individuals, and

to do every other act or acts, thing or things, incidental or appurtenant to or growing out of or connected with the aforesaid business or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized;

The business or purpose of the corporation is from time to time to do any one or more of the acts and things hereinabove set forth, and it shall have power to conduct and carry on its said business, or any part thereof, and to have one or more offices, and to exercise any or all of its corporate powers and rights, in the State of Delaware, and in the various other states, territories, colonies and dependencies of the United States, in the District of Columbia, and in all or any foreign countries, but nothing herein contained shall authorize the corporation to carry on an agency and loan business in the State of Illinois or a railroad business in that state.

The enumeration herein of the objects and purposes of [fol. 37] this corporation shall be construed as powers as well as objects and purposes and shall not be deemed to exclude by inference any powers, objects or purposes which this corporation is empowered to exercise, whether expressly by force of the laws of the State of Delaware now or hereafter in effect or impliedly by the reasonable construction of the said laws.

Fourth. The total number of shares of stock which the corporation is authorized to issue is five hundred thousand (500,000) shares without par value.

The Board of Directors, without action by the stockholders, may issue and sell the authorized shares of the capital stock of the corporation from time to time, for such consideration and upon such terms as may be fixed from time to time by the Board of Directors, and all such shares of stock so issued shall be deemed fully paid and non-assessable, and the holder or holders of such shares shall not be liable to the corporation or to its creditors in respect thereof, or for any future payments thereon.

The minimum amount of capital with which the corporation will commence business is one thousand dollars ($1,000).

Fifth. The names and places of residence of each of the incorporators are as follows:

Name	Residence	No. of shares
Charles H. Jarvis	Dover, Delaware	4
J. Fenimore Wilson	Dover, Delaware	3
Melvin Hopkins	Dover, Delaware	3

[fol. 38] Sixth. The corporation is to have perpetual existence.

Seventh. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth. The following provisions are inserted for the management of the business and for the conduct of the affairs of this corporation, and for further definition, limitation and regulation of the powers of this corporation and of its directors and stockholders;

(1) The number of directors of the corporation shall be such as from time to time shall be fixed by, or in the manner provided in the by-laws, but shall not be less than three. In case of any increase in the number of directors, the vacancies thus created may be filled by the directors or by the stockholders at an annual or special meeting as shall be provided in the by-laws.

(2) By a resolution or resolutions passed by a majority of the whole board, the board of directors may designate one or more committees, each committee to consist of two or more directors of the corporation, which to the extent provided in said resolution or resolutions or in the by-laws of the corporation, shall have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the by-laws of the corporation, or as may be determined from time to time by resolution adopted by the board of directors.

(3) The board of directors shall have power

[fol. 39] (a) Without the asse-t or vote of the stockholders, to make, alter, amend, change, add to, or repeal the

by-laws of this corporation; to fix and vary the amount to be reserved as working capital; to authorize and cause to be executed mortgages and liens upon all the property of the corporation, or any part thereof; to determine the use and disposition of any surplus or net profits over and above the capital stock paid in, and to fix the times for the declaration and payment of dividends.

(b) With the consent in writing of the holders of a majority of the stock issued and outstanding, or upon the affirmative vote of the holders of a majority of the stock issued and outstanding, to sell, lease or exchange all of its property and assets, including its good will and its corporate franchises; upon such terms and conditions and for such consideration as the board of directors shall deem expedient and for the best interests of the corporation.

(c) To determine from time to time whether, and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation (other than the stock ledger) or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the corporation unless expressly so [fol. 40] authorized by statute or by a resolution of the stockholders or the directors.

(4) The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the stock of the corporation which is represented in person or by proxy at such meeting and entitled to vote thereat (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of directors' interest, or for any other reason.

(5) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the

directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the Statutes of Delaware, of this certificate, and to any by-laws from time to time made by the stockholders; provided, however, that no by-laws so made shall invalidate any prior act of the directors which would have been valid if such by-law had not been made.

Ninth. The corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate [fol. 41] of incorporation in the manner now or hereafter prescribed by law, and all rights and powers conferred herein on stockholders, directors and officers are subject to this reserved power.

The directors and officers of this corporation may be directors and officers in other corporations, and transactions and contracts of this corporation with said other corporations shall not be affected by the fact that the officers hereof are interested in or are directors or officers of such other corporation or corporations.

This corporation shall have the power to procure itself to be licensed or organized in any state or subdivision thereof of the United States, the District of Columbia, the territories, colonies or possessions of the United States, and in any foreign country.

In witness whereof, we have hereunto set our hands and seals, the 25th day of April, 1930.

Charles H. Jarvis. (L.S.) J. Fenimore Wilson. (L.S.) Melvin Hopkins. (L.S.)

In presence of: Lillian C. Hutchins, as to all.

[fol. 42] STATE OF DELAWARE,
County of Kent, ss:

Be it remembered that on this 25th day of April, A. D. 1930, personally came before me, Lillian C. Hutchins, a Notary Public in and for the County and State aforesaid, Charles H. Jarvis, J. Fenimore Wilson, Melvin Hopkins, parties to the foregoing certificate of incorporation, known to me personally to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Lillian C. Hutchins, Notary Public.

Lillian C. Hutchins, Notary Public, Appointed Sept. 4, 1929, for two years, Delaware.

[fol. 43] STATE OF DELAWARE:

Office of Secretary of State

I, Charles L. Terry, Jr., Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of

Certificate of Incorporation of the "Continental Construction Corporation", as received and filed in this office the twenty-fifth day of April, A. D. 1930, at 9 o'clock A. M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover, this second day of April in the year of our Lord one thousand nine hundred and thirty-seven.

(Signed) Charles L. Terry, Jr., Secretary of State.
(Seal.)

[fol. 44] EXHIBIT 1a TO ANSWER

Certificate of Amendment of Certificate of Incorporation of Continental Construction Corporation

Adopted in Accordance With the Provisions of Section 26 of Chapter 65 of the Revised Code, as Amended, of the State of Delaware.

We, H. O. Caster, President, and E. E. McWhiney, Assistant Secretary, of Continental Construction Corporation, a corporation existing under the laws of the State of Delaware, do hereby certify under the seal of the said corporation as follows:

First. That it appears by the certificate of C. B. Wedum and John Kip, the Judges who were duly appointed by the stockholders of the corporation at a meeting duly called in accordance with the by-laws and the laws of the State of Delaware and held on the 8th day of December, 1931, at 2:15 o'clock in the afternoon, to conduct the vote of the stockholders for and against proposed amendments to the

certificate of incorporation, that the persons or body corporate holding one thousand (1000) shares of the capital stock of the corporation, constituting not less than a majority of the issued and outstanding capital stock of the corporation; voted in favor of said amendments; that no shares of the capital stock voted against the proposed amendments.

[fol. 45] Second. That the following is a true and correct copy of the amended Article "FIRST" of the Certificate of amendment as it was adopted at the stockholders' meeting as aforesaid:

"First. The name of the corporation is Natural Gas Pipeline Company of America."

Third. That the following is a true and correct copy of the amended Article "FOURTH" of the Certificate of Incorporation as it was adopted at the stockholders' meeting as aforesaid:

"Fourth. The total number of shares *to* stock which the corporation is authorized to issue is one million five hundred thousand (1,500,000) shares without par value.

The board of directors, without action by the stockholders may issue and sell the authorized shares of the capital stock of the corporation from time to time, for such consideration and upon such terms as may — fixed from time to time by the board of directors, and all such shares of stock so issued shall be deemed fully paid and non-assessable, and the holder or holders of such shares shall not be liable to the corporation or to its creditors in respect thereof, or for any future payments thereon; provided, however, that the stockholders of record at the time of the issuance of additional shares of stock shall have a prior right to subscribe for and take additional shares of the capital stock of this Company in proportion to their then holdings of shares of stock in this Company.

The minimum amount of capital with which the corporation will commence business is one thousand dollars ($1,000)."

Fourth. That said amendments have been duly adopted in accordance with the provisions of Section 26 of Chapter

65 of the Revised Code, as amended, of the State of Delaware, and that the capital of the corporation will not be reduced under or by reason of said amendments.

In Witness Whereof we, H. O. Caster, President, and [fols. 46-47] E. E. McWhiney, Assistant Secretary, of Continental Construction Corporation, have signed this certificate and caused the corporate seal of the corporation to be hereunto affixed this 8th day of December, 1931.

H. O. Caster, President. E. E. McWhiney, Assistant Secretary. Continental Construction Corporation, 1930.

[fol. 48] State of New York,
County of New York, ss:

Be it remembered, that on this 8th day of December, 1931, personally came before me, Gertrude Gray, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn to take acknowledgment or proof of deeds, H. O. Caster, President of Continental Construction Corporation, a corporation of the State of Delaware, the corporation described in the foregoing certificate, known to me personally to be such, and that he, the said H. O. Caster, as such President, duly executed said certificate before me and acknowledged the said certificate to be his act and deed, and made on behalf of said corporation; that the signature of said President and of the Assistant Secretary of the said corporation to said foregoing certificate are in the handwriting of the said President and of the said Assistant Secretary of said corporation respectively, and that the seal affixed to said certificate is the common or corporate seal of said corporation, and that his act of sealing, executing, acknowledging and delivering the said certificate was duly authorized by the directors and stockholders of said corporation.

In witness whereof, I have hereunto set my hand and seal of office the day and year aforesaid.

Gertrude Gray, Notary Public, New York County. N. Y. Co. Clk's No. 177, Reg. No. 2-G211. Term Expires March 30, 1933. (Seal of Gertrude Gray, Notary Public, New York County.)

[fol. 49] STATE OF DELAWARE:

Office of Secretary of State

I, Charles L. Terry, Jr., Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Amendment of Certificate of Incorporation of the "Continental Construction Corporation", as received and filed in this office the tenth day of December, A. D. 1931, at 9 o'clock A. M.

In testimony whereof, I have hereunto set my hand and official seal at Dover, this second day of April in the year of our Lord one thousand nine hundred and thirty-seven.

(Signed) Charles L. Terry, Jr., Secretary of State
(Seal.)

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF C. E. HOLMES—Filed April 10, 1937

STATE OF ILLINOIS,
County of Cook, ss:

C. E. Holmes, of lawful age, being first duly sworn according to law, on his oath, deposes and says:

Affiant states that he resides at 1629 Lunt Avenue, Chicago, Illinois; that he is in the employ of Natural Gas Pipeline Company of America, a Delaware corporation, in the capacity of an engineer; that he is an engineer by profession, having received a degree in Engineering from Iowa State College, Ames, Iowa; that on June 19, 1924, he entered the employ of Empire Gas and Fuel Company and associated and affiliated companies of Bartlesville, Oklahoma, sometimes referred to as "Empire Companies."

[fol. 51] That in August, 1929, affiant was called from his duties with the Empire Companies of Bartlesville, Oklahoma to participate in the engineering phases of a natural gas project from the Texas Panhandle gas fields to the metropolitan area of Chicago, Illinois; that upon the forma

tion of said company on April 25, 1930 he entered the employ of said company as an engineer.

Affiant further states that, among his duties as an engineer, he is in intimate contact with sales of natural gas by said company and knows the volume of such sales from the first delivery of natural gas to the present time, as well as the volume of sales of natural gas by The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois, Western United Gas and Electric Company (hereinafter referred to as the distributing companies) and Chicago District Pipeline Company.

Affiant further states that since October 16, 1931, the date upon which natural gas was first delivered to Chicago District Pipeline Company under the Natural Gas Sales Contract of July 25, 1931, between Chicago District Pipeline Company and Continental Construction Corporation (now Natural Gas Pipeline Company of America), there have been substantial reductions in the price of gas charged by said distributing companies to the industrial and domestic consumers in the Chicago metropolitan area; that in the year 1931, such reductions in the price of gas caused by the availability of natural gas and the price at which it was sold to [fol. 52] said distributing companies by Natural Gas Pipeline Company of America in said Chicago metropolitan area were such as to result in an annual saving to domestic and commercial consumers of gas of $2,789,000.00, and to industrial consumers of $350,000.00; that in the year 1932, additional rate reductions in said area by said distributing companies were such as to result in an annual saving to domestic and commercial consumers of gas of approximately an additional $142,000.00, and to industrial consumers of $70,000.00; that in the year 1933, additional rate reductions in said area by said distributing companies were such as to result in an annual saving to domestic and commercial consumers of gas of approximately an additional $1,200,000.00, and to industrial consumers of $500,000.00.

Affiant further states that from the said date of October 16, 1931 until the present time, the domestic and commercial consumers of gas in said area have benefited by rate reductions caused by the availability of natural gas and the price at which it was sold to said distributing companies by Natural Gas Pipeline Company of America in said area of

approximately $21,000,000.00, and to industrial consumers of $4,000,000.00.

Further affiant saith not.

C. E. Holmes.

Subscribed and sworn to before me on the 7th day of April, 1937. Esther M. Wilson, Notary Public. My commission expires on the 28th day of May, 1939 (Seal.)

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF S. E. CAMPBELL—Filed April 10, 1937

STATE OF ILLINOIS,
County of Cook, ss:

S. E. Campbell, of lawful age, being first duly sworn according to law, on his oath, deposes and says:

Affiant states that he resides at 2200 Harrison Street, Evanston, Illinois; that he is Secretary of Natural Gas Pipeline Company of America and is the same person who made the affidavit introduced into the record in this case.

Affiant states that under the terms of the contract dated July 25, 1931 between Continental Construction Corporation (now Natural Gas Pipeline Company of America) and Chicago District Pipeline Company, the said Chicago District Pipeline Company, an Illinois corporation, receives its en- [fol. 54] tire supply of natural gas for domestic purposes, although there are in existence other contracts between Natural Gas Pipeline Company of America and Chicago District Pipeline Company providing for a supply of natural gas for boiler fuel and industrial purposes which are short term contracts and which are not involved in the above entitled case; that said Chicago District Pipeline Company in turn sells such natural gas which it secures under the terms of the above mentioned contract of July 25, 1931 to three corporations; namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company, all Illinois corporations (hereinafter referred to as the distributing companies); that the entire income of said Chi-

cago District Pipeline Company is secured from said distributing companies on account of the sale to said distributing companies of the natural gas which it receives under said contract of July 25, 1931 from Natural Gas Pipeline Company of America and that under the rate schedules filed with the Illinois Commerce Commission by said Chicago District Pipeline Company, it only receives from the said distributing companies a sum of money equal to the price which it pays to Natural Gas Pipeline Company of America for said natural gas plus a small amount allowed by the Illinois Commerce Commission for operating and other expenses.

[fol. 55] Affiant further states that in the event the Illinois Commerce Commission should reduce the rates charged for natural gas by said Chicago District Pipeline Company to said distributing companies, said Chicago District Pipeline Company will not have sufficient income with which to pay said Natural Gas Pipeline Company of America for the natural gas which said Chicago District Pipeline Company purchases from it and that said Chicago District Pipeline Company will thereby be unable to comply with the terms of the said contract of July 25, 1931 and the Forebearance Agreement between Natural Gas Pipeline Company of America and Chicago District Pipeline Company dated December 31, 1935 attached to plaintiff's Bill of Complaint as an exhibit to the extent of the reduction in such rates which may be ordered by said Illinois Commerce Commission.

Further affiant saith not.

(Sgd.) S. E. Campbell.

Subscribed and sworn to before me on the 10th day of April, 1937. (Sgd.) Esther M. Wilson, Notary Public. My commission expires on the 28th day of May, 1939. (Seal.)

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF S. E. CAMPBELL—Filed April 10, 1937

STATE OF ILLINOIS,
County of Cook, ss:

S. E. Campbell, of lawful age, being first duly sworn according to law, on his oath, deposes and says:

Affiant resides at 2200 Harrison Street, Evanston, Illinois.

Affiant states that he is Secretary of Natural Gas Pipeline Company of America, a Delaware corporation, plaintiff in the above entitled action.

Affiant states that he is an engineer by profession; that he is a graduate of the University of Kansas, in the Department of Engineering; that in the year 1916, he entered the employ of Empire Gas and Fuel Company and affiliated companies, all of which were and are subsidiaries and affiliates of Cities Service Company, a Delaware corporation; [fol. 57] that while he was in the employ of said Empire Gas and Fuel Company and affiliated companies he served in various capacities in the Engineering Department and had a number of years experience in the engineering and construction phases of the natural gas, oil and refinery business; that on April 1, 1930, affiant entered the employ of Continental Construction Corporation, now Natural Gas Pipeline Company of America, as Assistant Chief Engineer, in charge of the construction under Mr. Floyd C. Brown, Vice-President and General Manager, and Mr. E. V. Kesinger, General Superintendent; that on the 19th day of November, 1930, among his other duties, affiant was elected Assistant Secretary of said corporation; that on July 1, 1931, affiant was placed in charge of operations as Superintendent of Operations; that on December 1, 1933, upon the resignation of the then Secretary of said corporation, this affiant was placed in charge of the Accounting Department of said corporation and gave up his duties as Superintendent of Operations; and that on November 3, 1934, he was elected Secretary of said corporation.

Affiant further states that he has read the Bill of Complaint filed in said action by plaintiff, together with the

Exhibits marked A, B, C and D, attached thereto, and particularly Exhibit D, entitled "Interlocutory Order", by the Illinois Commerce Commission, in the case of Illinois Com-
[fol. 58] merce Commission on its own motion vs. Chicago District Pipeline Company No. 25218, being a citation directed to the plaintiff, Natural Gas Pipeline Company of America, ordering and directing the said Natural Gas Pipeline Company of America on or before the 15th day of March, 1937 to file a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America, which is used in supplying natural gas to said Chicago District Pipeline Company, and a statement of the income and expense in connection with supplying gas to said Chicago District Pipeline Company or to report to the Illinois Commerce Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expense for such operations and, in addition, that said Natural Gas Pipeline Company of America make available for the examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipeline Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions.

[fol. 59] Affiant further states that, if Natural Gas Pipeline Company of America is required to comply with such Interlocutory Order of the Illinois Commerce Commission, it will be necessary for him to employ an outside firm of accountants to prepare and file with said Illinois Commerce Commission a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America, which is used in supplying natural gas to said Chicago District Pipeline Company, and a statement of the income and expense in connection with supplying gas to said Chicago District Pipeline Company, or to report to the Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations, inasmuch as the

present office accounting force of Natural Gas Pipeline Company of America is not manned to the extent necessary to supply such information and prepare the reports required by said Interlocutory Order.

Affiant states further that, since he has been Secretary of Natural Gas Pipeline Company of America, he has had experience in a number of instances in hiring outside accountants, engaged in the general practice of accounting and auditing, and is informed as to the amount charged for such services; that in preparing such reports, so re-
[fol. 60] quired by the said Illinois Commerce Commission and in making available to said Commission or its officers, agents or employees its accounts and records for examination, the cost and expense to which said Natural Gas Pipeline Company of America will be put will greatly exceed the sum of $3,000 and, if said Illinois Commerce Commission has the right, authority and jurisdiction to require such reports from Natural Gas Pipeline Company of America and to make available its records for examination from time to time, said company will be required to hire additional accountants for that purpose and the cost thereof will many times exceed the sum of $3,000.

Affiant further states that if said Natural Gas Pipeline Company of America is required to comply with said Interlocutory Order, its credit and business will be further irreparably damaged and injured in that it requires between one and two million dollars annually as a further investment in current additional facilities and betterments in order to maintain and keep in workable order and condition its said pipeline and facilities; and that, if it is finally determined that said Illinois Commerce Commission has the authority and jurisdiction over said Natural Gas Pipeline Company of America to require said company to do the things which it purports to have authority and jurisdiction to so require and if said Illinois Commerce Commission has the authority and jurisdiction which Natural
[fol. 61] Gas Pipeline Company of America alleges in its petition said Illinois Commerce Commission, its officers, agents or employees intend to exercise over said company, it will not be able to secure the moneys necessary for such current improvements and betterment of its facilities and the said Natural Gas Pipeline Company of America will sustain a loss and damage in the impairment of its credit

in an amount greatly in excess of $3,000.00 through its inability to maintain its service and fulfill its contract obligations.

Affiant further states that there is an important potential market for natural gas to the industries and municipalities located throughout the district which can be served by Natural Gas Pipeline Company of America, including the southern half of the state of Wisconsin and the northern part of the states of Illinois and Indiana. Natural gas can be supplied to the municipalities and to many of the industries located in this district at considerably less cost than the price paid for artificial gas and other fuels; yet, this district is now wholly unsupplied by natural gas except by Natural Gas Pipeline Company of America, which supplies gas to only a few municipalities and industries located in Northern Illinois and part of Indiana. Natural Gas Pipeline Company of America is anxious to extend its facilities and to sell natural gas to the industries [fol. 62] and municipalities located in said district, and because of the location of its pipeline, which crosses the state of Illinois from a point south of Rock Island, Illinois, to Joliet, Illinois, the position it occupies in the natural gas industry, and its experience in the transmission of natural gas under high pressure for long distances, it is peculiarly equipped to bring natural gas into this market. In order for Natural Gas Pipeline Company of America to bring natural gas to other parts of northern Illinois and Indiana and southern Wisconsin, it will be necessary for the company to enlarge and improve its facilities, construct additional pipelines and pumping stations and to make certain improvements and betterments in its present system, all of which will require large sums of money not now owned, possessed or controlled by the company. Natural Gas Pipeline Company of America has proposed and has and is considering the sale of bonds and other securities to obtain the necessary funds for the enlargement and extension of its facilities to bring natural gas to said market, but if the company is required to submit to the jurisdiction of the Illinois Commerce Commission, or to the said Interlocutory Order dated March 3, 1937, the company will be unable to sell its proposed securities or to borrow money for the purpose of bringing gas to said market, and its credit will be impaired and its business restricted and ham-

pered, and the company will be prevented from entering [fol. 63] said potential market and will suffer damage in a large and undeterminable sum greatly in excess of $3,000.00.

Further affiant saith not.

S. E. Campbell.

Subscribed and sworn to before me on the 6th day of April, 1937. Esther M. Wilson, Notary Public. My commission expires on the 28th day of May, 1939. (Seal.)

[fol. 64] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law Suggested and Requested by the Plaintiff—Filed June 17, 1937

Now comes Natural Gas Pipeline Company of America, the plaintiff in the above entitled cause, and, after hearing by the Court of its application for a preliminary or interlocutory injunction, requests the Court to find specially the following facts shown by the evidence adduced at said hearing:

1. On the 11th day of March, 1937, the plaintiff herein filed in this court a complaint in equity praying that a writ of injunction issue to restrain the persons constituting the Illinois Commerce Commission and Otto Kerner, Attorney General of the State of Illinois, from enforcing an order of the said Commission.

2. This cause was assigned for hearing to the Honorable William H. Holly, one of the judges of this court, and in accordance with the provisions of Section 266 of the Judicial Code of the United States of America the said judge did [fol. 65] call to hear plaintiff's application for an interlocutory injunction with him the Honorable Will M. Sparks, Circuit Judge of the Seventh Circuit, and the Honorable John P. Barnes, another of the judges of this Court.

3. On the 8th day of April, 1937, the said three judges heard the arguments of counsel for the respective parties

on said application for an interlocutory injunction, and thereafter said counsel filed memoranda of authorities in support of their respective contentions.

4. The defendants agreed not to enforce the order of the Illinois Commerce Commission dated March 3, 1937, pending the decision of the Court on the application for an interlocutory injunction.

5. The court has jurisdiction of the subject matter of and the parties to this proceeding.

6. The plaintiff, Natural Gas Pipeline Company of America, is a corporation organized under and existing by virtue of the laws of the State of Delaware and that it has offices at 19-20 Dover Green, Dover, Delaware, and at 20 North Wacker Drive, Chicago, Illinois.

7. The defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr are the persons presently constituting the Illinois Commerce Commission, which is an administrative body created by and acting under and pursuant to an act of the General Assembly of the State of Illinois entitled "An Act Concerning Public Utilities", approved June 29, 1921, and in force July 1, 1921, commonly referred to as the "Public Utilities Act" and that the defendant, Otto Kerner, is the Attorney General of the State of Illinois, the legal counsel for the [fol. 66] Illinois Commerce Commission, and that he is charged with the duty of commencing and conducting suits and proceedings to enforce the orders of the Commission and the provisions of the Public Utilities Act, and to recover and enforce the fines and penalties imposed by the Public Utilities Act for its violation or the violation or non-obedience of the orders of the Illinois Commerce Commission, and that each of said defendants is a resident and citizen of the State of Illinois.

8. This is a suit of a civil nature arising under the Constitution of the United States of America between citizens of different states within the equity jurisdiction of the District Court of the United States and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

9. Plaintiff is engaged in the sale, transportation and delivery of natural gas from a point or points in the State of

Oklahoma to distributors and consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois.

10. Said natural gas is transported from said point or points in the State of Oklahoma to said consumers or distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of a system of pipe lines and pumping stations.

11. Plaintiff's business and commerce is wholly interstate and national in character, and plaintiff is not engaged in intrastate commerce within the State of Illinois.

12. Plaintiff is not qualified to do an intrastate business within the State of Illinois under the terms and provisions of the laws of the State of Illinois, and is not a public utility nor subject to the jurisdiction or control of the Illinois Com- [fol. 67] merce Commission under the Illinois Public Utilities Act, and has not been the recipient of any rights and/or privileges by force of any statute, franchise or ordinance of the State of Illinois or of any governmental subdivision thereof.

13. On or about the 25th day of July, 1931, the plaintiff, then known as the Continental Construction Corporation, and Chicago District Pipeline Company, an Illinois corporation, made and executed a certain agreement in writing for the sale of natural gas to the said Chicago District Pipeline Company, a copy of which is attached to plaintiff's bill of complaint as Exhibit A. On or about the 31st day of December, 1935, the plaintiff and the said Chicago District Pipeline Company made and executed a certain agreement of forbearance, a copy of which is attached to plaintiff's bill of complaint as Exhibit B.

14. On or about the 17th day of November, 1936, the Illinois Commerce Commission issued a citation against the Chicago District Pipeline Company, an Illinois corporation, a copy of which is attached to plaintiff's bill of complaint as Exhibit C, requiring the said company to appear before it and show cause, if any there might be, why the rates charged by said company for gas sold to operating companies should not be reduced.

15. Thereafter, hearings were instituted by said Illinois Commerce Commission on said citation, and on the 3rd day

of March, 1937, and after the Chicago District Pipeline Company had closed its evidence, completed its proof and rested its case, the Illinois Commerce Commission entered another order, directed to and served upon Natural Gas Pipeline [fol. 68] Company of America, directing it to file with the Illinois Commerce Commission, on or before the 15th day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to the Commission in substitution thereof a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses of such operations, and further ordering that the said Natural Gas Pipeline Company of America make available for the examination of the Commission, or such of its officers, agents or employees as it might designate, all of said Natural Gas Pipeline Company of America's accounts and records relating to transactions between the said company and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which might be applicable to said transactions, and that this is the order which the plaintiff now seeks to restrain.

16. The Natural Gas Pipeline Company of America is not a party to said citation or to said proceedings against the Chicago District Pipeline Company, and said order of March 3, 1937 was made and entered by said Illinois Commerce Commission without notice to the plaintiff and without giving the plaintiff an opportunity to be heard prior to the entry thereof.

17. Prior to September 1, 1931, all or substantially all of the outstanding capital stock of Chicago District Pipeline Company was owned or held by Insull, Son & Co., Inc., [fol. 69] an Illinois corporation, and, since September 1, 1931, by Natural Gas Investment Company, an Illinois Corporation.

18. The outstanding capital stock of Natural Gas Pipeline Company of America, at the times hereinafter men-

tioned, was and is held by the following named corporations, substantially in the amounts indicated, namely:

	Distribution on July 25, 1931	Distribution on December 31, 1935	Present Distribution
Insull, Son & Co., Inc., an Illinois corporation	26.63%	0.00%	0.00%
Cities Service Company, a Delaware corporation	26.63%	26.63%	26.63%
Natural Gas Investment Company, an Illinois corporation	0.00%	26.63%	26.63%
The Texas Corporation, a Delaware corporation	17.58%	17.58%	17.58%
Standard Oil Company, a New Jersey corporation	26.62%	13.31%	13.31%
Southwestern Development Company, a Colorado corporation	0.00%	13.31%	13.31%
Columbian Carbon Company, a Delaware corporation	2.53%	2.53%	2.53%

19. On July 25, 1931, all of the outstanding capital stock of Insull, Son & Co., Inc., was owned by Insull Utility Investments, Inc., an Illinois corporation, which was not owned or controlled directly or indirectly by any one or more of the corporations listed in the above finding.

20. The stock of Natural Gas Investment Company is held by the following named corporations, substantially in the amounts indicated:

Peoples Gas Subsidiary Corporation, an Illinois corporation	79.54%
[fol. 70] Commonwealth Subsidiary Corporation, an Illinois corporation	4.28%
Public Service Co. of Northern Illinois, an Illinois corporation	16.18%

21. All of the outstanding capital stock of the Peoples Gas Subsidiary Corporation, an Illinois corporation, is owned by The Peoples Gas Light and Coke Company, an Illinois corporation, and all of the outstanding capital stock of the Commonwealth Subsidiary Corporation, an Illinois corporation, is owned by Commonwealth Edison Company, an Illinois corporation.

22. At the time of the negotiation for and execution of the contract of July 25, 1931, and the agreement of forebearance, referred to above, the board of directors of the plaintiff corporation consisted of eight members; said board has subsequently been enlarged to include nine members; Natural Gas Investment Company and Insull, Son & Co., Inc., have been represented by not more than two members of said board.

23. On July 8, 1933 there was added to the Public Utilities Act, referred to above, by amendment, Section 8a, which provides in part as follows:

"(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section, the phrase 'affiliated interests' means:

* * * * * * *

"(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital [fol. 71] stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

* * * * * * *

"(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;"

24. It is upon this Section of the Public Utilities Act that the defendants rely as authority for the order of the Illinois Commerce Commission of March 3, 1937

25. The affairs of the plaintiff and of Chicago District Pipeline Company are controlled by their respective boards of directors and officers, acting pursuant to their charters and the laws of the states of their incorporation.

26. Neither Natural Gas Investment Company, Insull, Son & Co., Inc. nor any of the other corporations named above, have ever controlled or attempted to control the board of directors of Natural Gas Pipeline Company of America.

27. The defendants threaten to and intend to regulate, supervise and control the contracts, rates and other affairs of the plaintiff, and otherwise exercise jurisdiction and control over the plaintiff, and to inquire into the earnings, expenses and profits of the plaintiff, the value of its properties and investments, and the other business affairs of the plaintiff; that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Company and Natural Gas Pipeline Company of America as affiliated corporations with common stock ownership, and subject to common control, to regulate the business affairs of said corporations as a single enterprise under the jurisdiction of said Illinois Commerce Commission, to take [fol. 72] jurisdiction of and regulate the profits and income of the plaintiff, and to exercise all power, control and dominion over the plaintiff, which purports to have been granted to said Illinois Commerce Commission by Section 8a of said Public Utilities Act referred to in said order.

28. If the defendants are permitted to enforce the order of the Illinois Commerce Commission, dated March 3, 1937, plaintiff will suffer great inconvenience and expense, plaintiff's trade secrets, secret processes and methods of doing business will be exposed to its competitors, plaintiff's credit will be impaired, and plaintiff will be hampered and hindered in its interstate commerce and business affairs, and will suffer great and irreparable harm and injury.

29. The penalties provided by said Public Utilities Act for violation of or non-obedience of the orders of the Illinois Commerce Commission are so large and so severe as

to intimidate the plaintiff, its officers and agents, and to render it impracticable for the plaintiff to risk the imposition of said penalties or to resist the order of the Illinois Commerce Commission except in this Court.

30. Unless the Illinois Commerce Commission and the said Otto Kerner are restrained and enjoined, they will proceed with the proposed and threatened inquiry and investigation of the plaintiff's affairs and will compel the plaintiff, its officers, agents and employees to comply with said order of the said Illinois Commerce Commission, and enforce the penalties prescribed by the laws of the State of Illinois for violation of or non-obedience to said order, and plaintiff, its officers, agents and employees will be coerced by the threat of said penalties into compliance with [fol. 73] said order, to the great inconvenience, expense and irreparable loss and damage of the plaintiff.

31. The plaintiff states its willingness and intention and offers to do equity in the premises.

32. The Court has not passed upon or considered the validity or invalidity, or the constitutionality or unconstitutionality, of Section 8a of the Public Utilities Act of the State of Illinois, referred to above, in reaching its decision on plaintiff's application for an interlocutory injunction, nor upon the right of the defendants to require the plaintiff to comply with the order of the Commission dated March 3, 1937 under said Section 8a, and the decision of the Court in this case is not based upon that section of the Illinois Public Utilities Act.

Plaintiff also requests the Court to make the following conclusions of law, as provided by Federal Equity Rule 70½:

(a) Section 8a of the statute of the State of Illinois, commonly known as "An Act Concerning Public Utilities", approved June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A, Illinois Bar Statutes, 1935, Section 23 (1)), as applied by the defendants to the plaintiff herein, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Paragraph Third, and of the Fourteenth Amendment.

(b) The order of the Illinois Commerce Commission, dated March 3, 1937, entered pursuant to the supposed au-

thority granted by said Act and complained of in plaintiff's bill of complaint, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Para- [fol. 74] graph Third, and of the Fourteenth Amendment.

(c) Section 8a of the statutes of the State of Illinois, commonly known as "An Act Concerning Public Utilities", approved June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A Illinois Bar Statutes 1935, Section 23(1)), as applied by the defendants to the plaintiff herein, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

(d) The order of the Illinois Commerce Commission dated March 3, 1937, entered pursuant to the supposed authority granted by said Act, and complained of in plaintiff's bill of complaint, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

(e) The order of the Illinois Commerce Commission dated March 3, 1937 is not authorized by and is in contravention of Section 8a of the statute of the State of Illinois known as "An Act Concerning Public Utilities", approved by the Illinois State Legislature on June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A Illinois Bar Statutes 1935, Section 23(1)).

(f) The order of the Illinois Commerce Commission dated March 3, 1937 and complained of in complainant's bill of complaint exceeds the jurisdiction and lawful power and authority of the Illinois Commerce Commission and is wholly null and void.

(g) The defendants are not authorized nor empowered to inquire into, investigate or require the disclosure of the earnings, expenses or profits of the plaintiff, nor the value of its properties or investments, nor any other business or affair of the plaintiff.

[fol. 75] (h) The defendants are not authorized nor empowered nor have they authority or jurisdiction to regulate, control, supervise or interfere with the contracts or other business affairs of the plaintiff.

(i) The Public Utilities Act, and particularly Section 8a thereof, has no application to the plaintiff company and that

said Act is wholly null and void insofar as said Act or said Section 8a thereof purports to confer upon the Commission any jurisdiction or authority over the plaintiff, its officers or agents, or the plaintiff's business, books, records, contracts or affairs.

(j) Plaintiff will be deprived of its property and civil rights without due process of law, and denied the equal protection of the laws, and its papers and effects will be subject to unreasonable search and seizure, and plaintiff's interstate commerce will be unlawfully burdened, obstructed and hampered if the defendants are permitted to enforce the order of the Illinois Commerce Commission dated March 3, 1937.

(k) The plaintiff has no adequate and complete remedy at law, and only in a suit in equity and by the final decree and order of injunction of this Court can the plaintiff be protected in its property and constitutional rights.

Respectfully submitted, Sidley, McPherson, Austin & Burgess, Attorneys for Natural Gas Pipeline Company of America. J. J. Hedrick, Donald F. McPherson, Howard Neitzert, of Counsel for the Plaintiff.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM—Filed July 2, 1937

The court is of the opinion That the right of the Illinois Commerce Commission to the information which may be disclosed by an examination of the records of the plaintiff is not dependent upon the validity of the Illinois statute which seems to be particularly relied upon by counsel for the Illinois Commerce Commission. The Illinois Commerce Commission has a right to fix the rates to be charged by the Chicago District Pipeline Company, and, in order to do so, it has the power to determine what the operating costs of the Chicago District Pipeline Company should be. In order that the Commission may determine these costs, it has the right to get information wheresoever it may be found within its jurisdiction. If the records of the plaintiff contain such information, the Illinois Commerce Com-

mission can compel the production of those records before it. It is true that a procedure by way of a subpoena duces tecum would be the more usual method, but there is no essential difference between the command of a subpoena duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff preferred to produce its records only in response to a subpoena it might have pointed out this supposed defect of procedure to the Commission. Furthermore, if the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion. As far as this court can see, there is no reason for the intervention of this court by way of injunction.

William M. Sparks, Circuit Judge. John P. Barnes, District Judge. William H. Holly, District Judge.

[fol. 77] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law—July 2, 1937

The above entitled cause having come on to be heard on application of the plaintiff for an interlocutory injunction and the parties having appeared by their respective counsel, the court having heard arguments in support of their respective contentions and being duly advised in the premises now finds as findings of fact that:

1. On the 11th day of March, A. D. 1937, the plaintiff herein filed in this court a complaint in equity praying that a writ of injunction issue to restrain the persons constituting the Illinois Commerce Commission and Otto Kerner, Attorney General of the State of Illinois, from enforcing an order of the said Commission.

2. Said cause was assigned for hearing to the Honorable William H. Holly, one of the judges of this court, and in accordance with the provisions of Section 266 of the Judicial Code of the United States of America the said judge did call to hear this application for an interlocutory injunction with him the Honorable Will M. Sparks, Circuit Judge of the Seventh Circuit, and the Honorable John P. Barnes, another of the judges of this Court.

3. On the 8th day of April, A. D. 1937, the said three judges heard the arguments of counsel for the respective parties on the application for an interlocutory injunction, and thereafter said counsel filed memoranda of authorities in support of their respective contentions.

[fol. 78] 4. The defendants agreed not to enforce the order of the Illinois Commerce Commission dated March 3, 1937 pending the decision of the court on the application for an interlocutory injunction.

5. The court has jurisdiction of the subject matter of and the parties to this proceeding.

6. The plaintiff, Natural Gas Pipeline Company of America, is a corporation organized under and existing by virtue of the laws of the State of Delaware, and that it has offices at 19-20 Dover Green, Dover, Delaware, and at 20 North Wacker Drive, Chicago, Illinois.

7. The defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr are the persons presently constituting the Illinois Commerce Commission, which is an administrative body created by and acting under and pursuant to an act of the General Assembly of the State of Illinois entitled "An Act concerning public utilities," approved June 29, 1921, and in force July 1, 1921, commonly referred to as the "Public Utilities Act" and that the defendant, Otto Kerner, is the Attorney General of the State of Illinois, the legal counsel for the Illinois Commerce Commission, and that he is charged with the duty of commencing and conducting suits and proceedings to enforce the orders of the Commission and the provisions of the Public Utilities Act, and to recover and enforce the fines and penalties imposed by the Public Utilities Act for its violation or the violation or non-obedience of the orders of the Illinois Commerce Commission, and that each of said defendants is a resident and citizen of the State of Illinois.

8. This is a suit of a civil nature arising under the Constitution of the United States of America between citizens of different states within the equity jurisdiction of the District Court of the United States and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

9. On or about the 17th day of November, A. D. 1936, the Illinois Commerce Commission issued a citation (at-
[fol. 79] tached to bill of complaint herein as Exhibit C) against the Chicago District Pipeline Company, an Illinois corporation, requiring the said company to appear before it and show cause, if any there might be, why the rates charged by said company for gas sold to operating companies should not be reduced.

10. Thereafter, on March 3, 1937, in the same proceeding the said Illinois Commerce Commission entered another order (attached to bill of complaint herein as Exhibit D) directed to the Natural Gas Pipeline Company of America, plaintiff herein, requiring it to file with the Commission a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to the Commission in substitution thereof a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses of such operations, and further ordering that the said Natural Gas Pipeline Company of America make available for the examination of the Commission, or such of its officers, agents or employees as it might designate, all of said Natural Gas Pipeline Company of America's accounts and records relating to transactions between the said company and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which might be applicable to said transactions, and that this order which the plaintiff now seeks to restrain was served upon plaintiff.

11. The plaintiff is engaged in the sale, transportation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the States of Kansas, Nebraska, Iowa and Illinois, and that 85% of such natural gas is sold and delivered to distributors and consumers thereof in the State of Illinois.

12. Such natural gas is transported from said point or
[fol. 80] points in the State of Oklahoma to said consumers

or distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of pipelines and pumping stations.

13. On or about the 25th day of July, A. D. 1931, the plaintiff, then known as the Continental Construction Corporation, and Chicago District Pipeline Company, an Illinois corporation, made and executed an agreement in writing for the sale of natural gas to the said Chicago District Pipeline Company and that said contract was modified on or about the 31st day of December, A. D. 1935, when the plaintiff and the Chicago District Pipeline Company made and executed a certain agreement of forbearance.

14. Chicago District Pipeline Company is engaged in the sale, transportation and delivery of natural gas within the State of Illinois, being solely engaged in intrastate commerce and is a public utility within the scope and meaning of the Public Utilities Act and subject to and under the jurisdiction of the Illinois Commerce Commission, pursuant to the terms and provisions of the said Public Utilities Act.

15. All of the stock of Chicago District Pipeline Company is owned by Natural Gas Investment Company, an Illinois corporation.

16. The stock of Natural Gas Investment Company is owned by these corporations in the following amounts:

Peoples Gas Subsidiary Corporation, an Illinois Corporation	79.54%
Commonwealth Subsidiary Corporation, an Illinois Corporation	4.28%
Public Service Company of Northern Illinois, an Illinois Corporation	16.18%

17. All of the outstanding capital stock of the Peoples Gas Subsidiary Corporation, an Illinois corporation, is owned by The Peoples Gas Light and Coke Company, an Illinois corporation, and that all of the outstanding capital stock of the Commonwealth Subsidiary Corporation, an Illinois corporation, is owned by Commonwealth Edison Company, an Illinois corporation.

18. The outstanding capital stock of the plaintiff is [fol. 81] held by the following named corporations substantially in the amounts indicated:

Natural Gas Investment Company, an Illinois corporation 26.63%
Cities Service Company, a Delaware corporation ... 26.63%
The Texas Corporation, a Delaware corporation ... 17.58%
Standard Oil Company, a New Jersey corporation 13.31%
Southwestern Development Company, a Colorado corporation 13.31%
Columbian Corporation Company, a Delaware corporation 2.53%

19. The board of directors of the plaintiff corporation consists of nine members, and that at all times since the incorporation of said plaintiff two of the members of said board have been members of the board of directors of either Natural Gas Investment Company, Insull, Son & Co., Inc., and The Peoples Gas Light and Coke Company.

20. Section 8a of the Public Utilities Act in part provides as follows:

"(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section, the phrase 'affiliated interests' means:

* * * * * * *

(c) Every corporation, ten per centum or more of whose voting capital, stock is owned by any person or corporation owing ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

* * * * * * *

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility."

[fol. 82] 21. The said Natural Gas Pipeline Company of America, plaintiff herein, is affiliated with the Chicago District Pipeline Company within the provisions of Section 8a of the Public Utilities Act.

22. No pipeline company other than plaintiff operates in or near the territory served by Chicago District Pipeline Company, and that plaintiff has no competition from other wholesalers of natural gas in the Chicago area.

23. The Illinois Commerce Commission has the power and is charged with the duty under the Public Utilities Act of fixing just and reasonable rates for the sale of natural gas at wholesale by Chicago District Pipeline Company.

24. In order to fix just and reasonable rates for the said Chicago District Pipeline Company the said Illinois Commerce Commission must inquire into the reasonableness of the operating charges of said Chicago District Pipeline Company and that in 1936 the operating expenses claimed to have been incurred by said Chicago District Pipeline Company amounted to $12,818,713.89, of which amount $12,362,288.15 was paid to the plaintiff for gas purchased from it under the terms of the contract hereinbefore referred to.

25. The Illinois Commerce Commission was fully authorized to enter the order of March 3, 1937, complained of herein.

26. The entry of the said order of March 3, 1937, by the said Illinois Commerce Commission did not deprive plaintiff herein of notice or an opportunity to be heard before said Commission.

27. In 1932 R. W. Gallagher, one of the officers of the plaintiff, testified as to the actual earnings and investment of said Natural Gas Pipeline Company, plaintiff herein, and estimates as to its future earnings before the said Illinois Commerce Commission in the proceedings involving the application of said Chicago District Pipeline Company for approval of its present rate schedule.

28. Said order of March 3, 1937, complied in all respects with the requirements of the Constitution of the United [fol. 83] States of America and the Constitution of the State of Illinois as to due process.

29. It is reasonably necessary that the Illinois Commerce Commission investigate the earnings of plaintiff with respect to gas sales to the said Chicago District Pipeline Company, in order that said Commission might determine the reasonableness of the operating expenses of said Chicago District Pipeline Company.

The Court further finds as conclusions of law:

1. Natural Gas Pipeline Company of America, plaintiff herein, is not entitled to an interlocutory injunction in this proceeding, since it has failed to show that it is being denied any constitutional right by virtue of the action of the said Illinois Commerce Commission of March 3, 1937, or that it is about to suffer irreparable injury or damage by reason of said action of said Commission.

2. The order of March 3, 1937, is valid and proper under the police power of the State of Illinois, since it is in the nature of a subpoena to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction.

3. The order of March 3, 1937, being in the nature of a subpoena to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction, does not violate Subsection 3 of Section 8 of Article I of the Constitution of the United States.

4. The order of the 3d day of March, A. D. 1937, does not violate the "Due Process" Clause of the Constitution, being Section 1 of the 14th Amendment to said Constitution, since the plaintiff is in possession of relevant information bearing upon the operating expenses of the Chicago District Pipeline Company, a utility subject to the jurisdiction of the Commission.

5. The order of the 3d day of March, A. D. 1937, does not constitute an unlawful search and seizure of plaintiff's property.

[fol. 84] 6. The said Illinois Commerce Commission, under the provisions of Section 8a of the said Public Utilities Act, has the power to investigate transactions between the said Natural Gas Pipeline Company of America, a corpora-

tion, plaintiff herein, and the said Chicago District Pipeline Company.

7. The order of the Illinois Commerce Commission dated March 3, 1937, was duly authorized by the Public Utilities Act, and especially Section 8a thereof.

8. The application of the plaintiff, Natural Gas Pipeline Company of America, a corporation, for an interlocutory injunction should be denied.

Chicago, Illinois, July 2, 1937.
Enter:

William M. Sparks, Judge of the United States Circuit Court of Appeals for the Seventh Circuit. John P. Barnes, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division. William H. Holly, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

[fol. 85-88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING APPLICATION FOR INTERLOCUTORY INJUNCTION—July 2, 1937

The above entitled cause having come on to be heard on application of the plaintiff for an interlocutory injunction, and the parties having appeared by their respective counsel, and the court having heard arguments in support of their respective contentions and being duly advised in the premises;

It is Hereby Ordered, Adjudged and Decreed that the application of the plaintiff, Natural Gas Pipeline Company of America, a corporation, for an interlocutory injunction in this cause be, and the same is hereby, denied.

It is Further Ordered, Adjudged and Decreed that the effect of this order should be, and it is hereby, stayed for a period of not to exceed thirty (30) days from the date hereof, in order to provide said plaintiff, Natural Gas

Pipeline Company of America, an opportunity to perfect its appeal to the Supreme Court of the United States.

Chicago, Illinois, July 2nd, 1937.

Enter:

William M. Sparks, Judge of the United States Circuit Court of Appeals for the Seventh Circuit. John P. Barnes, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division. William H. Holly, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS.—Filed July 9, 1937

Now comes the said Natural Gas Pipeline Company of America, a corporation, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the order of this Court, organized pursuant to the provisions of Section 266 of the Judicial Code, which order was entered on the 2nd day of July, 1937, denying the application of the plaintiff for a preliminary or interlocutory injunction:

1. The Court erred in denying plaintiff's application for an interlocutory or preliminary injunction.

2. The Court erred in refusing and failing to make each of the findings of fact and each of the conclusions of law suggested and requested by the plaintiff and not included in the Court's findings of fact and conclusions of law.

3. The Court erred in making each of its findings of fact and each of its conclusions of law which were not requested and suggested by the plaintiff.

4. The findings of fact and conclusions of law made by [fol. 90] the Court do not support the Court's order denying plaintiff's application for an interlocutory or preliminary restraining order.

5. The memorandum of the Court, signed by the Judges and filed on the 2nd day of July, A. D. 1937, does not support the order of the Court denying plaintiff's application for an interlocutory or preliminary restraining order.

6. The Court erred in failing and refusing to find that Section 8a of the statute of the State of Illinois, commonly known as "An Act Concerning Public Utilities.", approved June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A, Illinois Bar Statutes, 1935, Section 23(1)), as applied by the defendants to the plaintiff herein, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Paragraph Third, and of the Fourteenth Amendment.

7. The Court erred in failing and neglecting to find that the order of the Illinois Commerce Commission, dated March 3, 1937, entered pursuant to the supposed authority granted by said Act and complained of in plaintiff's bill of complaint, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Paragraph Third, and of the Fourteenth Amendment.

8. The Court erred in failing and neglecting to find that Section 8a of the statute of the State of Illinois, commonly known as "An Act Concerning Public Utilities", approved June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A Illinois Bar Statutes 1935, Section 23(1)), as applied by the defendants to the plaintiff herein, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

[fol. 91] 9. The Court erred in failing and neglecting to find that the order of the Illinois Commerce Commission dated March 3, 1937, entered pursuant to the supposed authority granted by said Act, and complained of in plaintiff's bill of complaint, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

10. The Court erred in failing and neglecting to find that the order of the Illinois Commerce Commission dated March 3, 1937 is not authorized by and is in contravention of Section 8a of the statute of the State of Illinois known as "An Act Concerning Public Utilities", approved by the Illinois State Legislature on June 29, 1921, in force July 1, 1921,

as amended (Chapter 111-A Illinois Bar Statutes 1935, Section 23(1)).

11. The Court erred in failing and neglecting to find that the order of the Illinois Commerce Commission dated March 3, 1937 and complained of in complainant's bill of complaint exceeds the jurisdiction and lawful power and authority of the Illinois Commerce Commission and is wholly null and void.

12. The Court erred in failing and neglecting to find that the defendants are not authorized nor empowered to inquire into, investigate or require the disclosure of the earnings, expenses or profits of the plaintiff, nor the value of its properties or investments, nor any other business or affair of the plaintiff.

13. The Court erred in failing and neglecting to find that the defendants are not authorized nor empowered nor have they authority or jurisdiction to regulate, control, supervise or interfere with the contracts or other business affairs of the plaintiff.

14. The Court erred in failing and neglecting to find [fol. 92] that the Public Utilities Act, and particularly Section 8a thereof, has no application to the plaintiff company and that said Act is wholly null and void insofar as said Act or said Section 8a thereof purports to confer upon the Commission any jurisdiction or authority over the plaintiff, its offices or agents, or the plaintiff's business, books, records, contracts or affairs.

15. The Court erred in failing and neglecting to find that plaintiff will be deprived of its property and civil rights without due process of law, and denied the equal protection of the laws, and its papers and effects will be subject to unreasonable search and seizure, and plaintiff's interstate commerce will be unlawfully burdened, obstructed and hampered if the defendants are permitted to enforce the order of the Illinois Commerce Commission dated March 3, 1937.

16. The Court erred in failing and neglecting to find that the plaintiff has no adequate and complete remedy at law, and only in a suit in equity and by the final decree and order of injunction of this Court can the plaintiff be protected in its property and constitutional rights.

17. The Court erred in finding that the right of the Illinois Commerce Commission to the information which may be disclosed by an examination of the records of the plaintiff is not dependent upon the validity of the Illinois statute relied upon by counsel for the Illinois Commerce Commission.

18. The Court erred in finding that in determining the operating costs of the Chicago District Pipeline Company, the Illinois Commerce Commission has the right to get information wheresoever it may be found within its jurisdiction.

19. The Court erred in holding that if the records of the [fol. 93] plaintiff contain such information, the Illinois Commerce Commission can compel the production of those records before it.

20. The Court erred in finding that there is no essential difference between the command of a subpœna duces tecum and the order of the Commission which is sought to be restrained.

21. The Court erred in holding that if the plaintiff preferred to produce its records only in response to a subpœna, it might have pointed out this supposed defect of procedure to the Illinois Commerce Commission.

22. The Court erred in holding that if the order of the Illinois Commerce Commission complained of in the bill of complaint is broader than may be necessary, this likewise could have been pointed out to the Commission by way of motion.

23. The Court erred in finding no reason for intervention by way of injunction as prayed in the bill of complaint.

24. The Court erred in holding, in effect, that the plaintiff must first make objection to the order of March 3, 1937 before the Illinois Commerce Commission, before resorting to the Federal Court in equity.

25. The Court erred in finding that the contract between the Continental Construction Corporation and the Chicago District Pipeline Company was modified on or about the 31st day of December, A. D. 1935 when the plaintiff and the Chicago District Pipeline Company made and executed a certain agreement of forbearance.

26. The Court erred in finding that no pipeline company other than plaintiff operates in or near the territory served [fol. 94] by Chicago District Pipeline Company, and that plaintiff has no competition from other wholesalers of natural gas in the Chicago area.

27. The Court erred in finding that in order to fix just and reasonable rates for the said Chicago District Pipeline Company the said Illinois Commerce Commission must inquire into the reasonableness of the operating charges of said Chicago District Pipeline Company and that in 1936 the operating expenses claimed to have been incurred by said Chicago District Pipeline Company amounted to $12,818,713.89, of which amount $12,362,288.15 was paid to the plaintiff for gas purchased from it under the terms of the contract hereinbefore referred to.

28. The Court erred in finding that the Illinois Commerce Commission was fully authorized to enter the order of March 3, 1937, complained of herein.

29. The Court erred in finding that the entry of the said order of March 3, 1937, by the said Illinois Commerce Commission did not deprive plaintiff herein of notice or an opportunity to be heard before said Commission.

30. The Court erred in finding that said order of March 3, 1937 complied in all respects with the requirements of the Constitution of the United States of America and the Constitution of the State of Illinois as to due process.

31. The Court erred in finding that it is reasonably necessary that the Illinois Commerce Commission investigate the earnings of plaintiff with respect to gas sales to the said Chicago District Pipeline Company in order that said Commission might determine the reasonableness of the operat- [fol. 95] ing expenses of said Chicago District Pipeline Company.

32. The Court erred in finding that Natural Gas Pipeline Company of America, plaintiff herein, is not entitled to an interlocutory injunction in this proceeding, since it has failed to show that it is being denied any constitutional right by virtue of the action of the said Illinois Commerce Commission of March 3, 1937, or that it is about to suffer irreparable injury or damage by reason of said action of said Commission.

33. The Court erred in finding that the order of March 3, 1937 is valid and proper under the police power of the State of Illinois, since it is in the nature of a subpœna to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction.

34. The Court erred in finding that the order of March 3, 1937, being in the nature of a subpœna to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction, does not violate Subsection 3 of Section 8 of Article I of the Constitution of the United States.

35. The Court erred in finding that the order of the 3rd day of March, A. D. 1937, does not violate the "Due Process" Clause of the Constitution, being Section 1 of the 14th Amendment to said Constitution, since the plaintiff is in possession of relevant information bearing upon the operating expenses of the Chicago District Pipeline Company, a utility subject to the jurisdiction of the Commission.

[fol. 96] 36. The Court erred in finding that the order of the 3rd day of March, A. D. 1937 does not constitute an unlawful search and seizure of plaintiff's property.

37. The Court erred in finding that the application of the plaintiff, Natural Gas Pipeline Company of America, a corporation, for an interlocutory injunction should be denied.

38. The Court erred in failing and neglecting to find that plaintiff's business and commerce is wholly interstate and national in character, and that plaintiff is not engaged in intrastate commerce within the State of Illinois.

39. The Court erred in failing and refusing to find that the order of the Illinois Commerce Commission, dated March 3, 1937 and complained of in plaintiff's bill of complaint, was entered after the Chicago District Pipeline Company had closed its evidence, completed its proof and rested its case in the proceedings instituted by the citation of the Illinois Commerce Commission, copy of which is attached to plaintiff's bill of complaint as Exhibit C.

40. The Court erred in refusing and neglecting to find that plaintiff is not qualified to do an intrastate business

within the State of Illinois under the terms and provisions of the laws of the State of Illinois, and is not a public utility nor subject to the jurisdiction or control of the Illinois Commerce Commission under the Illinois Public Utilities Act, and has not been the recipient of any rights and/or privileges by force of any statute, franchise or ordinance of the State of Illinois or of any governmental subdivision thereof.

41. The Court erred in refusing and neglecting to find [fol. 97] that the Natural Gas Pipeline Company of America is not a party to said citation or to said proceedings against the Chicago District Pipeline Company, and said order of March 3, 1937 was made and entered by said Illinois Commerce Commission without notice to the plaintiff and without giving the plaintiff an opportunity to be heard prior to the entry thereof.

42. The Court erred in refusing and neglecting to find that at the time of the negotiation for and execution of the contract of July 25, 1931, and the agreement of forbearance, referred to above, the board of directors of the plaintiff corporation consisted of eight members; said board has subsequently been enlarged to include nine members; Natural Gas Investment Company and Insull, Son & Co., Inc., have been represented by not more than two members of said board.

43. The Court erred in refusing and neglecting to find that it is upon Section 8a of the Public Utilities Act that the defendants rely as authority for the order of the Illinois Commerce Commission of March 3, 1937.

44. The Court erred in refusing and neglecting to find that the affairs of the plaintiff and of Chicago District Pipeline Company are controlled by their respective boards of directors and officers, acting pursuant to their charters and the laws of the states of their incorporation.

45. The Court erred in refusing and neglecting to find that neither Natural Gas Investment Company, Insull, Son & Co., Inc., nor any of the other corporations named in paragraphs 19 to 21, inclusive, of findings of fact and conclusions of law suggested and requested by the plaintiff, have ever controlled or attempted to control the board of directors of Natural Gas Pipeline Company of America.

[fol. 98] 46. The Court erred in refusing and neglecting to find that the defendants threaten to and intend to regulate, supervise and control the contracts, rates and other affairs of the plaintiff, and otherwise exercise jurisdiction and control over the plaintiff, and to inquire into the earnings, expenses and profits of the plaintiff, the value of its properties and investments, and the other business affairs of the plaintiff; that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Company and Natural Gas Pipeline Company of America as affiliated corporations with common stock ownership, and subject to common control, to regulate the business affairs of said corporations as a single enterprise under the jurisdiction of said Illinois Commerce Commission, to take jurisdiction of and regulate the profits and income of the plaintiff, and to exercise all power, control and dominion over the plaintiff, which purports to have been granted to said Illinois Commerce Commission by Section 8a of said Public Utilities Act referred to in said order.

47. The Court erred in refusing and neglecting to find that if the defendants are permitted to enforce the order of the Illinois Commerce Commission, dated March 3, 1937, plaintiff will suffer great inconvenience and expense, plaintiff's trade secrets, secret processes and methods of doing business will be exposed to its competitors, plaintiff's credit will be impaired, and plaintiff will be hampered and hindered in its interstate commerce and business affairs, [fol. 99] and will suffer great and irreparable harm and injury.

48. The Court erred in refusing and neglecting to find that the penalties provided by said Public Utilities Act for violation of or non-obedience of the orders of the Illinois Commerce Commission are so large and so severe as to intimidate the plaintiff, its officers and agents, and to render it impracticable for the plaintiff to risk the imposition of said penalties or to resist the order of the Illinois Commerce Commission except in this Court.

49. The Court erred in refusing and neglecting to find that unless the Illinois Commerce Commission and the said Otto Kerner are restrained and enjoined, they will proceed with the proposed and threatened inquiry and investigation of the plaintiff's affairs and will compel the plaintiff,

its officers, agents and employees to comply with said order of the said Illinois Commerce Commission, and enforce the penalties prescribed by the laws of the State of Illinois for violation of or non-obedience to said order, and plaintiff, its officers, agents and employees will be coerced by the threat of said penalties into compliance with said order, to the great inconvenience, expense and irreparable loss and damage of the plaintiff.

50. The Court erred in finding that the said Illinois Commerce Commission, under the provisions of Section 8a of the said Public Utilities Act, has the power to investigate transactions between the said Natural Gas Pipeline Company of America, a corporation, plaintiff herein, and the said Chicago District Pipeline Company.

51. The Court erred in finding that the order of the Illinois Commerce Commission dated March 3, 1937 was duly authorized by the Public Utilities Act, and especially Sec- [fol. 100] tion 8a thereof.

52. The Court erred in finding that the said Natural Gas Pipeline Company of America, plaintiff herein, is affiliated with the Chicago District Pipeline Company within the provisions of Section 8a of the Public Utilities Act.

53. The Court erred in finding that in 1932 R. W. Gallagher, one of the officers of the plaintiff, testified as to the actual earnings and investment of said Natural Gas Pipeline Company, plaintiff herein, and estimates as to its future earnings before the said Illinois Commerce Commission in the proceedings involving the application of said Chicago District Pipeline Company for approval of its present rate schedule.

Wherefore, plaintiff prays that said order may be reversed and that plaintiff's application for a preliminary injunction may be granted and allowed, and for such other and further relief as to the Court may seem just and proper.

Natural Gas Pipeline Company of America, by J. J. Hedrick, Donald F. McPherson, Howard Neitzert, Its Attorneys. Sidley, McPherson, Austin & Burgess, Attorneys for the Plaintiff.

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—July 9, 1937

This day comes the plaintiff, Natural Gas Pipeline Company of America, by its attorneys, and files herein and presents to this Court of three Judges, organized pursuant to the provisions of Section 266 of the Judicial Code of the United States, its petition praying for an allowance of an appeal in this cause to the Supreme Court of the United States, agreeable to the statutes and rules of the Court in such case made and provided, praying also that a transcript of record, proceedings, affidavits and other documents upon which the order of this Court denying plaintiff's application for a preliminary or interlocutory injunction was rendered, duly authenticated, may be transmitted to the Supreme Court of the United States.

Now, therefore, said petition for leave to appeal is hereby granted and said appeal is allowed to the Supreme Court of the United States.

And it is Further Ordered that a citation be issued as provided by law and that a transcript of the record, proceedings, affidavits and other documents upon which said order is based, duly authenticated, be transmitted to the Supreme Court of the United States as in such case is by law made and provided.

[fols. 102-113] It is Further Ordered that the bond on appeal be fixed at the sum of Two hundred and fifty Dollars.

Enter:

William M. Sparks, Circuit Judge. John P. Barnes, District Judge. William H. Holly, District Judge.

Chicago, Illinois, July 9th, 1937.

[fol. 114] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANT AND OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed July 22, 1937

To the Honorable Judges of the Supreme Court of the United States:

The points relied upon by the appellant for a reversal of the Order of the Court of three judges denying appel-
[fol. 115] lant's application for an interlocutory injunction are the following:

1. Section 8a of the statute of the State of Illinois commonly known as "An Act Concerning Public Utilities," approved June 29, 1921, in force July 1, 1921, as amended (Chapter 111-A Illinois Bar Statutes, 1935, Section 23(1)) as applied by the appellees to the appellant herein, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Paragraph Third, and of the Fourteenth Amendment.

2. The order of the Illinois Commerce Commission, dated March 3, 1937, entered pursuant to the supposed authority granted by said Act and complained of in appellant's bill of complaint, is in contravention of the Constitution of the United States, especially of Article 1, Section 8, Paragraph Third, and of the Fourteenth Amendment.

3. Section 8a of the statute of the State of Illinois, commonly known as "An Act Concerning Public Utilities," approved June 29, 1921, in force July 1, 1921, as amended, (Chapter 111-A Illinois Bar Statutes 1935, Section 23(1)) as applied by the appellees to the appellant herein, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

4. The order of the Illinois Commerce Commission dated March 3, 1937, entered pursuant to the supposed authority granted by said Act, and complained of in appellant's bill of complaint, is in contravention of the Constitution of the State of Illinois, especially of Section 6 of Article II.

5. The order of the Illinois Commerce Commission dated March 3, 1937 is not authorized by and is in contravention of Section 8a of the statute of the State of Illinois known as "An Act Concerning Public Utilities," approved by the

Illinois State Legislature on June 29, 1921, in force July 1, [fol. 116] 1921, as amended, (Chapter 111-A, Illinois Bar Statutes, 1935, Section 23 (1)).

6. The order of the Illinois Commerce Commission dated March 3, 1937 and complained of in appellant's bill of complaint exceeds the jurisdiction and lawful power and authority of the Illinois Commerce Commission and is wholly null and void.

7. The appellees are not authorized nor empowered to inquire into, investigate or require the disclosure of the earnings, expenses or profits of the plaintiff, nor the value of its properties or investments, nor any other business or affair of the appellant.

8. The appellees are not authorized nor empowered nor have they authority or jurisdiction to regulate, control, supervise or interfere with the contracts or other business affairs of the appellant.

9. The "Act Concerning Public Utilities", and particularly Section 8a thereof, has no application to the appellant company, and said Act is wholly null and void insofar as said Act or said Section 8a thereof purports to confer upon the Commission any jurisdiction or authority over the appellant, its officers or agents, or the appellant's business, books, records, contracts or affairs.

10. Appellant will be deprived of its property and civil rights without due process of law, and denied the equal protection of the laws, and its papers and effects will be subject to unreasonable search and seizure, appellant's interstate commerce will be unlawfully burdened, obstructed and hampered and its credit impaired if the appellees are permitted to enforce the order of the Illinois Commerce Commission dated March 3, 1937.

11. The fines and penalties provided by the laws of the State of Illinois for violation or non-obedience of orders of [fol. 117] the Illinois Commerce Commission are so large and so severe as to preclude the appellant from resisting said order of the Illinois Commerce Commission. These fines and penalties include criminal prosecution of the officers, attorneys, agents and employes of the appellant and the imposition upon appellant of a maximum fine of $2,000 a day for the period of non-compliance.

If the appellant does comply with the demands of the Illinois Commerce Commission as stated in said order, there is no further point or substance to the litigation. The damage to the appellant will be immediate, complete and irreparable upon compliance with the said order of the Commission. It follows, therefore, that unless the injunction here prayed is granted, appellant will have been deprived both of a trial on the merits in the Court below and of the right to a reveiw by this Court of the order denying the preliminary injunction.

12. The appellees threaten to and intend, unlawfully and without legal authority, to regulate, supervise and control the contracts, rates and other affairs of the appellant, and otherwise exercise jurisdiction and control over the appellant, and to inquire into the earnings, expenses and profits of the appellant, the value of its properties and investments, and the other business affairs of the appellant. It is the avowed intention of the appellees to treat the Chicago District Pipeline Company and Natural Gas Pipeline Company of America as affiliated corporations with common stock ownership, and subject to common control, to regulate the business affairs of said corporation as a single enterprise under the jurisdiction of the Illinois Commerce Commission, to take jurisdiction of and regulate the profits and income of the appellant, and to exercise all power, control and dominion over the appellant, which purports to have [fol. 118] been granted to said Illinois Commerce Commission by Section 8a of said "Act Concerning Public Utilities."

13. Appellant adopts, in addition to the above designated points, its Assignment of Errors as further points to be relied upon in this appeal.

The following parts of the record heretofore filed in this cause are necessary for the consideration of the above points relied upon by the appellant:

1. Bill of Complaint of Natural Gas Pipeline Company of America, filed March 11, 1937, and all exhibits attached thereto.

2. Application for preliminary injunction and for the organization of a three judge court as provided by Section 266 of the Judicial Code, filed by the appellant on March 19, 1937.

3. Order organizing a three judge court under Section 266 of the Judicial Code, signed by His Honor, Judge Holly, as of March 19, 1937.

4. The joint and several answers of James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane, and Harry A. Barr, the persons constituting the Illinois Commerce Commission of the State of Illinois, and Otto Kerner, Attorney General of the State of Illinois, filed April 6, 1937.

5. Two affidavits of S. E. Campbell, filed by the appellant on April 10, 1937.

6. The affidavit of C. E. Holmes, filed on April 10, 1937.

7. Findings of fact and conclusions of law suggested and requested by the appellant, filed by the appellant on June 17, 1937.

8. Memorandum of the Court, signed by the three judges and filed on July 2, 1937.

[fol. 119] 9. Findings of fact and conclusions of law, signed by the three judges, dated July 2, 1937.

10. Order denying appellant's application for preliminary injunction, dated July 2, 1937.

Natural Gas Pipeline Company of America, by William P. Sidley, J. J. Hedrick, Donald F. McPherson, Howard Neitzert, Its Attorneys and Counsel.

Received a copy of the foregoing Statement, this 20th day of July, A. D. 1937.

Otto Kerner, Attorney General and Attorney for Appellees. James G. Skinner, M. S. Winning, Harry R. Booth, W. Robert Ming, Jr., Assistant Attorneys General and Attorneys for Appellees.

[fol. 120] [File endorsement omitted.]

Endorsed on cover: File No. 41,711. N. Illinois, D. C. U. S. Term No. 230. Natural Gas Pipeline Company of America, appellant, vs. James M. Slattery, Andrew Olson, Charles E. Byrne, et al, etc. Filed July 20, 1937. Term No. 230 O. T. 1937.

MOTION OF APPELLEES TO ADVANCE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE, and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois,

Appellees.

Docket No. 230.

MOTION OF APPELLEES TO ADVANCE.

OTTO KERNER,
Attorney General, State of Illinois,
Attorney for Appellees.

JAMES G. SKINNER,
MONTGOMERY S. WINNING,
HARRY R. BOOTH,
W. ROBERT MING, Jr.,
Assistants Attorney General,
Of Counsel.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation,
Appellant,
vs.
JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois,
Appellees.
Docket No. 230.

MOTION OF APPELLEES TO ADVANCE.

Come now the Appellees in the above entitled cause and move that this case be advanced for hearing and in support of their motion make the following brief statement of the matters involved and the reasons relied upon for advancement:

This is a suit by a Delaware corporation engaged in the transportation and sale of natural gas from the Panhandle area in Texas to distributors and consumers in Illinois, Kansas, Nebraska and Iowa, (90% of the company's business consisting of sales to distributors in Illinois) by means of a system of pipe lines and pumping

stations. Pursuant to the authority contained in Section 8A of "An Act Concerning Public Utilities", approved June 29, 1921, in force July 1, 1921, as amended, being one of the Acts of the General Assembly of the State of Illinois, the Illinois Commerce Commission on March 3, 1937, entered an interlocutory order in a proceeding involving an investigation of the rates and charges of Chicago District Pipeline Company, an Illinois public utility affiliated with Appellant and engaged in the sale of natural gas to distributors in the Chicago metropolitan area and operating wholly intrastate, directing the Appellant to submit a report to the said Illinois Commerce Commission as to the cost of Appellant's property used by it in transporting and selling natural gas to the said Chicago District Pipeline Company, and as to the operating expenses incurred and profits realized by Appellant from such business, and requiring said Appellant to make its books available for examination by officers and agents of the Commission.

The stock of Appellant is owned and held by six corporations in varying percentages with Natural Gas Investment Company owning 26.6% of that stock. Of the stock of Natural Gas Investment Company 79.54% is owned by the Peoples Gas Light & Coke Company, currently seeking to enjoin in the State courts of Illinois the enforcement of an order of the Illinois Commerce Commission of May 21, 1937, denying the application of said company for permission to increase its rates by approximately Three Million Dollars per year. The stock of Chicago District Pipeline Company, which supplies natural gas to the Peoples Gas Light & Coke Company, is entirely owned by Natural Gas Investment Company.

In addition Chicago District Pipeline Company, Natural Gas Investment Company and Appellant have two directors in common.

Immediately following the entry of the order by the Illinois Commerce Commission on March 3, 1937, the Appellant filed this suit in the District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin the enforcement of said order on the ground that both the action of the Commission and Section 8A of the Public Utilities Act hereinbefore referred to, were in violation of the Constitution of the United States and of the State of Illinois. After full hearing the three judge court organized pursuant to Section 266 of the Judicial Code, entered complete findings of fact and conclusions of law and on July 2, 1937, entered an order denying the application of Appellant for an interlocutory injunction. However, a stay of 30 days was allowed by the trial court "in order to provide said plaintiff an opportunity to perfect its appeal to the Supreme Court of the United States."

Thereafter on July 28th Appellant appeared before his Honor Mr. Justice Owen J. Roberts, and moved the court for an order to preserve the *status quo* pending appeal. Appellees appeared in opposition to this motion and a hearing was had. On August 5, 1937, an order was entered by Mr. Justice Roberts enjoining the Appellees from enforcing the order of the Commission of March 3, 1937, pending disposition of this appeal.

The controversy is one of great public interest to the State of Illinois and to the people thereof inasmuch as the effective regulation of the rates and charges of the Chicago District Pipeline Company depends upon a determination of the reasonableness of the operating expenses of Chicago District Pipeline Company. During the year 1936 the total operating expenses of Chicago District Pipeline Company amounted to $12,818,713.89, of which amount the sum of $12,362,288.15 was paid to Appellant for gas purchased from it.

The price paid for gas by Chicago District Pipeline Company is determined pursuant to a contract entered into between Appellant and said Chicago District Pipeline Company dated July 25, 1931, as modified by an Agreement of Forebearance, dated December 31, 1935. There is no competing pipeline company in the Chicago area and the only means by which the Commission can determine the fairness and reasonableness of the operating expenses of said Chicago District Pipeline Company and the rates for which it sells natural gas to local distributing companies is to determine whether the profits which Appellant is currently realizing from sale of natural gas to the Chicago District Pipeline Company are excessive and unreasonable.

Although the statutory court gave full consideration to all of the matters involved herein and came to the conclusion that Appellant was not entitled to an interlocutory injunction, the order of this court of August 5, 1937, depriving Appellees of the power to enforce the order of March 3, 1937, amounts practically to an interlocutory injunction since the Commission is restrained from enforcing its order of March 3, 1937, until this appeal shall have been disposed of.

One of the arguments advanced by counsel for Appellant at the hearing before Mr. Justice Owen J. Roberts was that if the order prayed for by Appellant were to be entered the time which would elapse before the final disposition of the case by this court would be very short. Moreover, counsel for Appellant agreed at that time to cooperate with counsel for Appellees to expedite the hearing of this matter in this court. Counsel for Appellant, however, have declined to join in this motion.

Since the case involves the constitutionality of a Stat-

ute of Illinois we respectfully submit that the matter should be disposed of at the earliest convenience of the court in order that the State might proceed in an orderly fashion with the regulation of public utility companies operating within its boundaries. So long as the restraining order heretofore entered is in effect, the Illinois Commerce Commission is seriously hampered in its ability to regulate adequately the rates and charges of the Chicago District Pipeline Company, whose rates, currently being investigated by said Commission, are an important factor in determining the reasonableness of the charges of The Peoples Gas Light and Coke Company, whose rates are now the subject of litigation in the State Courts of Illinois.

WHEREFORE Appellees pray that this cause be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

OTTO KERNER,
Attorney for Appellees.

JAMES G. SKINNER,
MONTGOMERY S. WINNING,
HARRY R. BOOTH,
W. ROBERT MING, JR.,
Assistants Attorney General,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPE LINE COMPANY OF AMERICA,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

J. J. HEDRICK,
DONALD F. MCPHERSON,
HOWARD NEITZERT,
Counsel for Appellant.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity.

No. 15562

NATURAL GAS PIPE LINE COMPANY OF AMERICA, A CORPORATION,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE AND HARRY A. BARR, THE PERSONS CONSTITUTING THE ILLINOIS COMMERCE COMMISSION OF THE STATE OF ILLINOIS, AND OTTO KERNER, ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

The proposed appeal from the order of the three-judge court organized pursuant to the provisions of Section 266 of the Judicial Code, and sitting in the above captioned cause, denying plaintiff's application for an interlocutory injunction is authorized by Section 266 of the Judicial Code (28 U. S. C. A. 380) and involves the validity of an order of the Illinois Commerce Commission, entered March 3, 1937, wherein it is

> "Ordered by the Illinois Commerce Commission that Natural Gas Pipe Line Company of America be, and the same is hereby, ordered and directed to file forth-

with in this proceeding on or before the Fifteenth (15th) day of March, A. D., 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipe Line Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

"It is Further Ordered that the said Natural Gas Pipe Line Company of America make available for the examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipe Line Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions."

Said order is based upon the provisions of Section 8a of an Act of the General Assembly of the State of Illinois, entitled, "An Act Concerning Public Utilities", approved June 29, 1921 and in force July 1, 1921, as amended (Chapter 111-A, Illinois Revised Statutes, 1935, Section 23(1)), which provides in part as follows:

"(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to

require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section, the phrase 'affiliated interests' means:

* * * * * * *

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;"

The order appealed from was entered on July 2, 1937, and application for appeal is presented to the Court this 9th day of July, 1937.

This case involves the constitutionality of the State statute and order of the Illinois Commerce Commission referred to above. It is contended that the statute and the order are in contravention of the Constitution of the United States, especially Article 1, Section 6, Paragraph 3, and the Fourteenth Amendment, and the Constitution of the State of Illinois, especially of Section 6, Article 2 thereof. The statute subjects to the jurisdiction of the Illinois Commerce Commission every person, firm and corporation holding 10% or more of the capital stock of an Illinois Public utility, and every corporation, 10% of whose capital stock is owned by an Illinois public utility. The constitutionality of the statute is a matter of grave doubt and considerable public importance, yet unless the plaintiff is granted an interlocutory injunction in this case the plaintiff will not have an opportunity to assert its constitutional rights in the three-judge court organized pursuant to Section 266 of the Judicial Code for the reason that if the plaintiff refuses to comply with the order of the Illinois Commerce Commission, the officers, attorneys, agents and employees of

the plaintiff, under the provisions of Sections 76 and 77 of the Illinois Public Utilities Act (Chapter 111-A, Illinois Revised Statutes of 1935, paragraphs 95 and 96), become subject to criminal prosecution, and the plaintiff to a maximum fine of Two Thousand Dollars ($2000) a day for the period of non-compliance. These drastic penalties preclude plaintiff's non-compliance pending a trial on the merits unless the plaintiff is given the protection of a restraining order. But if the plaintiff does comply with the demands of the Commission there is no further point or substance to this proceeding. The plaintiff's damage will be immediate, complete and irreparable upon compliance with the order, and the plaintiff will suffer great injury resulting from the expense of compliance, disclosure of its trade secrets and methods of doing business and the destruction of its credit and its interstate commerce will be burdened, hampered and obstructed.

The three-judge court organized pursuant to Section 266 of the Judicial Code has abused its discretion in overlooking these important considerations and summarily and without a hearing on the merits holding the order of the Illinois Commerce Commission and the above quoted portions of Section 8a of the Illinois Public Utilities Act constitutional, as applied to the plaintiff.

We believe that Section 266 of the Judicial Code (28 U. S. C. A. 380) and the following cases sustain the jurisdiction of the Supreme Court to hear this appeal:

Herkness v. *Irion*, 278 U. S. 92;
Cumberland Telephone Company v. *Public Service Commission*, 260 U. S. 212;
In Re Buder, 271 U. S. 461;
Shaffer v. *Carter*, 252 U. S. 37;
Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290;
Pendergast v. *New York Telephone Co.*, 262 U. S. 43.

A copy of the order appealed from, memorandum of the Court and findings of fact and conclusions of law, filed on July 2, 1937, in connection with the entry of the order herein appealed from, are attached hereto.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
By J. J. HEDRICK,
DONALD MCPHERSON,
HOWARD NEITZERT,
Its Attorneys.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Attorneys for Plaintiff,

Chicago, Illinois, July 9, 1937.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

IN EQUITY.

No. 15562.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

Order.

The above entitled cause having come on to be heard on application of the plaintiff for an interlocutory injunction, and the parties having appeared by their respective counsel, and the court having heard arguments in support of their respective contentions and being duly advised in the premises;

It is Hereby Ordered, Adjudged and Decreed that the application of the plaintiff, Natural Gas Pipeline Company of America, a corporation, for an interlocutory injunction in this cause be, and the same is hereby, denied.

It is Further Ordered, Adjudged and Decreed that the effect of this order should be, and it is hereby, stayed for a period of not to exceed thirty (30) days from the date hereof, in order to provide said plaintiff, Natural Gas Pipeline Com-

pany of America, an opportunity to perfect its appeal to the Supreme Court of the United States.

Chicago, Illinois, July 2, 1937.

Enter:

WILLIAM M. SPARKS,
Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

JOHN P. BARNES,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

WILLIAM H. HOLLY,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 15,562.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

vs.

JAMES M. SLATTERY *et al.*

Memorandum.

The court is of the opinion that the right of the Illinois Commerce Commission to the information which may be disclosed by an examination of the records of the plaintiff is not dependent upon the validity of the Illinois statute which seems to be particularly relied upon by counsel for the Illinois Commerce Commission. The Illinois Commerce Com-

mission has a right to fix the rates to be charged by the Chicago District Pipeline Company, and, in order to do so, it has the power to determine what the operating costs of the Chicago District Pipeline Company should be. In order that the Commission may determine these costs, it has the right to get information wheresoever it may be found within its jurisdiction. If the records of the plaintiff contain such information, the Illinois Commerce Commission can compel the production of those records before it. It is true that a procedure by way of a subpœna duces tecum would be the more usual method, but there is no essential difference between the command of a subpœna duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff preferred to produce its records only in response to a subpœna it might have pointed out this supposed defect of procedure to the Commission. Furthermore, if the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion. As far as this court can see, there is no reason for the intervention of this court by way of injunction.

WILLIAM M. SPARKS,
Circuit Judge.
JOHN P. BARNES,
District Judge.
WILLIAM H. HOLLY,
District Judge.

EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

IN EQUITY.

No. 15562.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

Findings of Fact and Conclusions of Law.

The above entitled cause having come on to be heard on application of the plaintiff for an interlocutory injunction and the parties having appeared by their respective counsel, the court having heard arguments in support of their respective contentions and being duly advised in the premises now finds as findings of fact that:

1. On the 11th day of March, A. D. 1937, the plaintiff herein filed in this court a complaint in equity praying that a writ of injunction issue to restrain the persons constituting the Illinois Commerce Commission and Otto Kerner, Attorney General of the State of Illinois, from enforcing an order of the said Commission.

2. Said cause was assigned for hearing to the Honorable William H. Holly, one of the judges of this court, and in accordance with the provisions of Section 266 of the Judicial Code of the United States of America the said judge did call to hear this application for an interlocutory injunction with him the Honorable Will M. Sparks, Circuit Judge

of the Seventh Circuit, and the Honorable John P. Barnes, another of the judges of this Court.

3. On the 8th day of April, A. D. 1937, the said three judges heard the arguments of counsel for the respective parties on the application for an interlocutory injunction, and thereafter said counsel filed memoranda of authorities in support of their respective contentions.

4. The defendants agreed not to enforce the order of the Illinois Commerce Commission dated March 3, 1937 pending the decision of the court on the application for an interlocutory injunction.

5. The court has jurisdiction of the subject matter of and the parties to this proceeding.

6. The plaintiff, Natural Gas Pipeline Company of America, is a corporation organized under and existing by virtue of the laws of the State of Delaware, and that it has offices at 19-20 Dover Green, Dover, Delaware, and at 20 North Wacker Drive, Chicago, Illinois.

7. The defendants, James M. Slattery, Andrew Olson, Charles E. Byrne, James D. Marnane and Harry A. Barr are the persons presently constituting the Illinois Commerce Commission, which is an administrative body created by and acting under and pursuant to an act of the General Assembly of the State of Illinois entitled "An Act concerning public utilities," approved June 29, 1921, and in force July 1, 1921, commonly referred to as the "Public Utilities Act" and that the defendant, Otto Kerner, is the Attorney General of the State of Illinois, the legal counsel for the Illinois Commerce Commission, and that he is charged with the duty of commencing and conducting suits and proceedings to enforce the orders of the Commission and the provisions of the Public Utilities Act, and to recover and enforce the fines and penalties imposed by the Public Utilities Act for its violation or the violation or non-obedience of the orders of the Illinois Commerce Commission, and that each of said defendants is a resident and citizen of the State of Illinois.

8. This is a suit of a civil nature arising under the Constitution of the United States of America between citizens of different states within the equity jurisdiction of the District Court of the United States and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

9. On or about the 17th day of November, A. D. 1936, the Illinois Commerce Commission issued a citation (attached to bill of complaint herein as Exhibit C) against the Chicago District Pipeline Company, an Illinois corporation, requiring the said company to appear before it and show cause, if any there might be, why the rates charged by said company for gas sold to operating companies should not be reduced.

10. Thereafter, on March 3, 1937, in the same proceeding the said Illinois Commerce Commission entered another order (attached to bill of complaint herein as Exhibit D) directed to the Natural Gas Pipeline Company of America, plaintiff herein, requiring it to file with the Commission a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to the Commission in substitution thereof a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses of such operations, and further ordering that the said Natural Gas Pipeline Company of America make available for the examination of the Commission, or such of its officers, agents or employees as it might designate, all of said Natural Gas Pipeline Company of America's accounts and records relating to transactions between the said Company and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which might be applicable to said trans-

actions, and that this order which the plaintiff now seeks to restrain was served upon plaintiff.

11. The plaintiff is engaged in the sale, transportation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the States of Kansas, Nebraska, Iowa and Illinois, and that 85% of such natural gas is sold and delivered to distributors and consumers thereof in the State of Illinois.

12. Such natural gas is transported from said point or points in the State of Oklahoma to said consumers or distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of pipelines and pumping stations.

13. On or about the 25th day of July, A. D. 1931, the plaintiff, then known as the Continental Construction Corporation, and Chicago District Pipeline Company, an Illinois corporation, made and executed an agreement in writing for the sale of natural gas to the said Chicago District Pipeline Company and that said contract was modified on or about the 31st day of December, A. D. 1935, when the plaintiff and the Chicago District Pipeline Company made and executed a certain agreement of forbearance.

14. Chicago District Pipeline Company is engaged in the sale, transportation and delivery of natural gas within the State of Illinois, being solely engaged in intrastate commerce and is a public utility within the scope and meaning of the Public Utilities Act and subject to and under the jurisdiction of the Illinois Commerce Commission, pursuant to the terms and provisions of the said Public Utilities Act.

15. All of the stock of Chicago District Pipeline Company is owned by Natural Gas Investment Company, an Illinois corporation.

16. The stock of Natural Gas Investment Company is owned by these corporations in the following amounts:

Peoples Gas Subsidiary Corporation, an Illinois Corporation	79.54%
Commonwealth Subsidiary Corporation, an Illinois Corporation	4.28%
Public Service Company of Northern Illinios, an Illinois Corporation	16.18%

17. All of the outstanding capital stock of the Peoples Gas Subsidiary Corporation, an Illinois corporation, is owned by The Peoples Gas Light and Coke Company, an Illinois corporation, and that all of the outstanding capital stock of the Commonwealth Subsidiary Corporation, an Illinois corporation, is owned by Commonwealth Edison Company, an Illinois corporation.

18. The outstanding capital stock of the plaintiff is held by the following named corporations substantially in the amounts indicated:

Natural Gas Investment Company, an Illinois corporation	26.63%
Cities Service Company, a Delaware corporation	26.63%
The Texas Corporation, a Delaware corporation	17.58%
Standard Oil Company, a New Jersey corporation	13.31%
Southwestern Development Company, a Colorado corporation	13.31%
Columbian Corporation Company, a Delaware corporation	2.53%

19. The board of directors of the plaintiff corporation consists of nine members, and that at all times since the incorporation of said plaintiff two of the members of said board have been members of the board of directors of either Natural Gas Investment Company, Insull, Son & Co., Inc. and The Peoples Gas Light and Coke Company.

20. Section 8a of the Public Utilities Act in part provides as follows:

"(2) The Commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon,

with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to acounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section, the phrase 'affiliated interests' means:

• • • • • • •

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

• • • • • • •

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility."

21. The said Natural Gas Pipeline Company of America, plaintiff herein, is affiliated with the Chicago District Pipeline Company within the provisions of Section 8a of the Public Utilities Act.

22. No pipeline company other than plaintiff operates in or near the territory served by Chicago District Pipeline Company, and that plaintiff has no competition from other wholesalers of natural gas in the Chicago area.

23. The Illinois Commerce Commission has the power and is charged with the duty under the Public Utilities Act of fixing just and reasonable rates for the sale of natural gas at wholesale by Chicago District Pipeline Company.

24. In order to fix just and reasonable rates for the said Chicago District Pipeline Company the said Illinois Commerce Commission must inquire into the reasonableness of the operating charges of said Chicago District Pipeline Company and that in 1936 the operating expenses claimed to have been incurred by said Chicago District Pipeline Company amounted to $12,818,713.89, of which amount $12,362,288.15 was paid to the plaintiff for gas purchased from it under the terms of the contract hereinbefore referred to.

25. The Illinois Commerce Commission was fully authorized to enter the order of March 3, 1937, complained of herein.

26. The entry of the said order of March 3, 1937, by the said Illinois Commerce Commission did not deprive plaintiff herein of notice or an opportunity to be heard before said Commission.

27. In 1932 R. W. Gallagher, one of the officers of the plaintiff, testified as to the actual earnings and investment of said Natural Gas Pipeline Company, plaintiff herein, and estimates as to its future earnings before the said Illinois Commerce Commission in the proceedings involving the application of said Chicago District Pipeline Company for approval of its present rate schedule.

28. Said order of March 3, 1937, complied in all respects with the requirements of the Constitution of the United States of America and the Constitution of the State of Illinois as to due process.

29. It is reasonably necessary that the Illinois Commerce Commission investigate the earnings of plaintiff with respect to gas sales to the said Chicago District Pipeline Company, in order that said Commission might determine the reasonableness of the operating expenses of said Chicago District Pipeline Company.

The Court further finds as conclusions of law:

1. Natural Gas Pipeline Company of America, plaintiff herein, is not entitled to an interlocutory injunction in this

proceeding, since it has failed to show that it is being denied any constitutional right by virtue of the action of the said Illinois Commerce Commission of March 3, 1937, or that it is about to suffer irreparable injury or damage by reason of said action of said Commission.

2. The order of March 3, 1937, is valid and proper under the police power of the State of Illinois, since it is in the nature of a subpoena to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction.

3. The order of March 3, 1937, being in the nature of a subpœna to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction, does not violate Subsection 3 of Section 8 of Article I of the Constitution of the United States.

4. The order of the 3d day of March, A. D. 1937, does not violate the "Due Process" Clause of the Constitution, being Section 1 of the 14th Amendment to said Constitution, since the plaintiff is in possession of relevant information bearing upon the operating expenses of the Chicago District Pipeline Company, a utility subject to the jurisdiction of the Commission.

5. The order of the 3rd day of March, A. D. 1937, does not constitute an unlawful search and seizure of plaintiff's property.

6. The said Illinois Commerce Commission, under the provisions of Section 8a of the said Public Utilities Act, has the power to investigate transactions between the said Natural Gas Pipeline Company of America, a corporation, plaintiff herein, and the said Chicago District Pipeline Company.

7. The order of the Illinois Commerce Commission dated March 3, 1937, was duly authorized by the Public Utilities Act, and especially Section 8a thereof.

8. The application of the plaintiff, Natural Gas Pipeline Company of America, a corporation, for an interlocutory injunction should be denied.

Chicago, Illinois, July 2, 1937.
Enter:

WILLIAM M. SPARKS,
Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

JOHN P. BARNES,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

WILLIAM H. HOLLY,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
A CORPORATION,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE AND HARRY A. BARR, THE PERSONS CONSTITUTING THE ILLINOIS COMMERCE COMMISSION OF THE STATE OF ILLINOIS, AND OTTO KERNER, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

WILLIAM P. SIDLEY,
J. J. HEDRICK,
DONALD F. MCPHERSON,
HOWARD NEITZERT,
Counsel for Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 230.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the persons constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois,

Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

Appellees have filed a motion to dismiss the appeal. While Appellant believes the motion to be without merit, this short brief in opposition is filed pursuant to Paragraph 3 of Rule 7.

THE COURT HAS JURISDICTION OF THIS APPEAL.

This appeal is from an order of a three judge statutory court organized pursuant to Section 266 of the Federal Judicial Code, sitting in the United States District Court for the Northern District of Illinois, Eastern Division. The order complained of was one denying an interlocutory in-

junction against the enforcement of an order of the Illinois Commerce Commission, extending its jurisdiction over the rates and business affairs of Appellant, which is a company engaged in national interstate commerce, namely, the transportation of natural gas from the Panhandle of Texas through various states to Illinois. Appellant is a Delaware corporation, not qualified to do business in Illinois, is not a public utility, enjoys no franchise or other privileges from the State of Illinois or any governmental subdivision thereof, and is not subject to the jurisdiction of the Illinois Commerce Commission.

The discretion of this court as to whether or not a review will be granted, as in the case of petitions for writs of *certiorari,* is not here involved. Section 266 of the Judicial Code (28 U. S. C. A. 380) provides in part as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

This Court on numerous occasions has held that it has jurisdiction of a direct appeal from an order of a three judge court such as the one here complained of.

Clark v. *Poor,* 274 U. S. 554, 71 L. Ed. 1199.
Colorado v. *Toll,* 268 U. S. 228, 69 L. Ed. 927.
Arkadelphia Milling Co. v. *St. Louis Southwestern R. Co.,* 249 U. S. 134, 63 L. Ed. 517.
Ex parte Buder, 271 U. S. 461, 70 L. Ed. 1036.

A DIRECT APPEAL TO THIS COURT IS PERMITTED UNDER SECTION 266 OF THE FEDERAL JUDICIAL CODE IN CASES IN WHICH THE CONSTITUTIONALITY OF A STATE STATUTE IS INVOLVED.

Appellant contended before the three judge court that Section 8a of the Illinois statute entitled, "An Act Concerning Public Utilities," in force July 1, 1921, as amended, (Chapter 111-A, Illinois Revised Statutes 1935, Section

23 (1)) is violative of the United States Constitution. Consequently a three judge court was necessary and a direct appeal to this Court lies from the order of that Court as a matter of statutory right to the Appellant.

Conclusion.

Appellant has properly perfected its appeal and in accordance with provisions of Paragraph 1 of Rule 12, in its "Statement as to Jurisdiction" has indicated those respects in which Appellant believes the three judge court to have abused its discretion in denying the motion for an interlocutory injunction. An Associate Justice of this Court has painstakingly examined the record, has heard arguments of counsel for both Appellant and Appellees, has read their briefs, and has granted Appellant's motion for an injunction to maintain the status quo by enjoining the enforcement of the order of the Illinois Commerce Commission of March 3, 1937, above mentioned, until the determination of this appeal by this Court.

Appellees' motion to dismiss is without substance and should be overruled.

Respectfully submitted,

Natural Gas Pipeline Company of America,
Appellant.

By William P. Sidley,
J. J. Hedrick,
Donald F. McPherson,
Howard Neitzert,
Its Attorneys.

Chicago, Illinois,
August 12, 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., ETC.,
Appellees.

REPLY OF APPELLANT TO MOTION OF APPELLEES TO ADVANCE.

WILLIAM P. SIDLEY,
J. J. HEDRICK,
DONALD F. MCPHERSON,
DOUGLAS F. SMITH,
HOWARD NEITZERT,
Counsel for Appellant.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 230.

NATURAL GAS PIPE LINE COMPANY OF AMERICA,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., ETC.,
Appellees.

REPLY OF APPELLANT TO MOTION OF APPELLEES TO ADVANCE.

Now comes the appellant in the above entitled cause, by its counsel, and, without admitting the allegations made in support of the motion of the appellees to advance this cause for hearing, consents to the prayer of said motion that this cause be advanced upon the calendar of this Court and assigned for a hearing at an early date.

Appellant respectfully shows the Court, however, that its brief has not been prepared or filed in this cause, and because of the importance of the case to appellant it requests that it be allowed at least thirty days from the date hereof within which to prepare and file said brief and that

the case be not set for hearing before the expiration of that period.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

By William P. Sidley
J. J. Hedrick
Douglas F. Smith
Donald F. McPherson
Arundel Leitzell
Its Counsel.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Attorneys for Appellant.

September 24, 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,
vs.
JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT.

WILLIAM P. SIDLEY,
J. J. HEDRICK,
DONALD F. MCPHERSON,
DOUGLAS F. SMITH,
HOWARD NEITZERT,
Counsel for Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINIONS DELIVERED IN THE COURT BELOW.

There is no official report of the opinions delivered in the court below. Soon after the court announced its decision to deny appellant's application for an interlocutory injunction, it mailed to counsel a memorandum opinion, which appears on pages 89 and 90 of the Record, and which was later filed by the court with its order denying appellant's application (R. 97). Thereafter, counsel for the appellees prepared and submitted to the court certain Findings of Fact and Conclusions of Law which the court also signed and filed with its order. These Findings of Fact and Conclusions of Law appear on pages 90 to 97, inclusive, of the Record.

The memorandum opinion of the court is referred to on pages 20, 41 and 42 of the brief.

The Findings of Fact and Conclusions of Law filed by the court are referred to on pages 13, 20 and 42 of the brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal under Section 266 of the Judicial Code* from an order of a three judge court, organized pursuant to the provisions of that section, denying appellant's application for an interlocutory injunction.

Suit was started in the District Court for the Northern District of Illinois to enjoin the enforcement of an order of the Illinois Commerce Commission†, hereinafter called

* 28 U. S. C. A. 380.

† The order of the Illinois Commerce Commission complained of in this cause is set out in Appendix A attached to this brief, pages 62 to 67; see also pages 47 to 51 of the Record.

the "Commission". The defendants and appellees are the persons constituting the Illinois Commerce Commission, and the Attorney General of the State of Illinois (R. 1). The appellant and plaintiff is a Delaware corporation organized in 1930 engaged in the sale, transportation and delivery of natural gas from the Panhandle area in Texas to industries and distributors of natural gas in the States of Kansas, Nebraska, Iowa and Illinois by means of a system of pipelines and pumping stations. Appellant's business and commerce is wholly interstate and national in character. Appellant is not qualified to do business in the State of Illinois, enjoys no franchise or statutory privilege from the State, and is not a public utility subject to the jurisdiction or control of the Illinois Commerce Commission (R. 1, 2).

Most of the gas brought into the State of Illinois by appellant is sold and delivered by it to Chicago District Pipeline Company near Joliet, Illinois. This company, in turn, sells, transports and delivers the gas, by a system of pipelines, to Western United Gas and Electric Company, Public Service Company of Northern Illinois, and The Peoples Gas Light and Coke Company, distributors of gas in and adjacent to the Chicago metropolitan area (R. 3. 45). The contract pursuant to which appellant sells gas to the Chicago District Pipeline Company was executed on July 25, 1931, and the contracts covering the resale of the gas by the latter to the distributing companies were executed shortly thereafter (R. 3, 10). The Chicago District Company, and the three distributing companies, are all public utilities engaged in local business in the State of Illinois.*

The order involved in this case was entered in a certain proceeding instituted by a citation of the Illinois Commerce Commission directing Chicago District Pipeline Company,

* For a detailed statement concerning the business and control of these corporations, see Appendix C, this brief pages 76 to 78.

to show cause why there should not be a reduction in rates charged by it for gas sold to the distributing companies in the State of Illinois*. The order directed to appellant was entered by the Commission after Chicago District Pipeline Company had made full response to the citation, closed its evidence, and rested its case. Appellant was not a party to that proceeding and received no notice or hearing before the entry of the order (R. 3, 4).

Summary Statement of Issues.

The stock of the Chicago District Company is owned by an investment company which owns 26.63 per cent of appellant's common stock (R. 4), and two of appellant's nine directors are also directors of the Chicago District Company (R. 6, 50). Section 8a of the Illinois Public Utilities Act†, defines corporations having a director or elective officer in common with a local public utility, or related to such utility by ten per cent common stock ownership, as "affiliated interests". The statute, as construed by the Commission, gives it jurisdiction over "affiliated interests" to require them to give the Commission access to their books and records, and to prepare and submit such statistical data and reports as the Commission may direct. Purporting to exercise the jurisdiction thus granted the Commission ordered the appellant to prepare and present certain reports for the stated purpose of enabling the Commission to pass judgment upon the reasonableness of the earnings received by appellant under its contract with the Chicago District Company, on the theory that ten per cent

* The citation of the Illinois Commerce Commission referred to above is included in Appendix A attached to this brief page 59; see also page 44, *et seq.*, of the Record.

† Section 8a of the Illinois Public Utilities Act (Ch. 111⅔ Ill. Rev. Stat. 1937, Sec. 8a) is set out in full in Appendix B, this brief page 68. This section was added by amendment to the Illinois Public Utilities Act in July, 1933, two years after the supply contract between appellant and the Chicago District Pipeline Company was executed.

common stock interest is the equivalent of common control of or the absence of arm's length bargaining between two corporations, regardless of what the actual facts may be.

The appellant asserts as a fact, alleges in its complaint (R. 4, 5), and is ready at the first opportunity to prove that the relationship between it and the Chicago District Company does not result in common control of the two companies, and did not, in any degree, or in any manner influence the actions or policies of either party to the contract or any of the terms or provisions thereof, that, on the contrary the contract was executed after the most rigid arm's length bargaining in an open competitive market.

Appellant contends: (1) that properly construed, the statute relied upon does not authorize the order complained of; (2) that if the statute has been properly construed by the Commission to give it jurisdiction over appellant to demand access to its books and records and the submission of reports, then the statute is unconstitutional.

The position of the Illinois Commerce Commission can best be illustrated by reference to the decision of this court in *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119. In that case all of the stock of a local gas company and all of the stock of an interstate pipeline company supplying gas to the local distributor was owned by Cities Service Company. This Court held that those in control of the situation had combined the interstate carriage of gas with its local distribution, in what was in practical effect, one organization; that there was an absence of arm's length bargaining between the two corporate entities involved and all the elements which ordinarily go to fix market value, and that under such circumstances the Commission could require *the local utility*

under its jurisdiction to make a showing of the reasonableness of the profits of the affiliated interstate supply company, although it was specifically recognized that that might involve a presentation of evidence *which would not be required in the case of parties dealing at arm's length* and in the general and open market subject to the usual safeguards in bargaining competition. The Illinois Commerce Commission by its interpretation of Section 8a of the Public Utilities Act and the order here complained of, seeks to extend the doctrine laid down in the *Western Distributing Company Case* in two respects: (1) A ten per cent common stock interest or one or more directors in common is arbitrarily made the equivalent of common control and the absence of arm's length bargaining; (2) the burden is placed upon the interstate supply company rather than the local utility to show the reasonableness of its profits accruing from its contract with the local utility. Appellant contends that these innovations would deprive appellant of its property without due process of law, would deny it the equal protection of the laws and would impose an illegal burden on interstate commerce.

Analysis of Section 8a of the Public Utilities Act.

The order complained of purports to be based upon Section 8a of the Illinois Public Utilities Act*. That Act seeks to give the Commission certain jurisdiction over those coming within two broad classes of interests which have any transactions with local utilities. One class consists of those which may be determined *as a matter of fact, after investigation and hearing, to be actually exercising substantial influence over the policies and actions of the public*

* Section 8a of the Illinois Public Utilities Act (Ch. 111⅔ Ill. Rev. Stat. 1937, Sec. 8a) is set out in full in Appendix B, this brief page 68. This section was added by amendment to the Illinois Public Utilities Act in July, 1933, two years after the supply contract between appellant and the Chicago District Pipeline Company was executed.

utility. The statutory provisions descriptive of this class are as follows:

> SEC. 8a 2(g). "Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.
>
> (h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated".

The second class of interests, of which the statute seeks to give the State Commission jurisdiction, includes every corporation, ten per cent of whose capital stock is owned by a person or corporation owning ten per cent of the capital stock of such public utility, and every corporation which has one or more elective officers or directors in common with such public utility, regardless of whether or not it could be found "as a matter of fact after investigation and hearing" to be "actually exercising any substantial influence over the policies and actions of such public utility." The provisions of the section which creates this class are in part as follows:

> "SEC. 8a. * * * (c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;
>
> "(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility";

The interests coming within both these broad classes are defined alike as "affiliated interests". The jurisdiction granted by the statute runs against "affiliated interests" and the existence of a common stock interest in the amount of 10%, or a common director or elective officer, is thus made the exact equivalent of a determination *as a matter of fact after investigation and hearing that substantial influence over the policies and actions of the public utility is actually being exercised.*

For reasons satisfactory to it, the State Commission has elected to proceed under those provisions of Section 8a, quoted last above (R. 48, 49). Appellant is declared to be an affiliated interest of the Chicago District Company, not on the ground that it has been determined as a matter of fact, after investigation and hearing, to be actually exercising any substantial influence over the policies and actions of the Chicago District Company, but strictly in reliance upon common stock ownership and common directors sufficient to bring appellant within the arbitrary classification of the statute.

The jurisdiction given the Commission by Section 8a over both classes of affiliated interests, defined as stated above, is as follows:

> "(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities, under the jurisdiction of the commission to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. * * *
>
> "(3) No management, construction, engineering, supply, financial or similar contract and no contract or

arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, *hereafter made* with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and approved by the Commission". (Italics ours.)

The Commission has interpreted paragraph (2) above, not as granting jurisdiction to obtain access to necessary information and records solely in aid of its duty under paragraph (3) to pass upon contracts, made after the enactment of the statute, but as an independent grant of power which may be exercised for such purposes as the Commission may deem appropriate, even if the contract between the affiliate and the public utility, like that here, was made prior to the enactment of the statute.

The Order of the Commission Assailed in This Cause.

The order of the Illinois Commerce Commission complained of by appellant provides, in part,* as follows:

"IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Natural Gas Pipeline Company of America be, and the same is hereby, ordered and directed to file forthwith in this proceeding on or before the Fifteenth (15th) day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipeline Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission, in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

"IT IS FURTHER ORDERED that the said Natural Gas Pipeline Company of America make available for the

* The order of the Illinois Commerce Commission is set out in Appendix A attached to this brief, pages 62 to 67. See also pages 47 *et seq.* of the Record.

examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipeline Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions".

Proceeding on the conclusive presumption, that the existence of a ten per cent common stock interest or a common director or elective officer is the equivalent of a finding, as a fact, after investigation and hearing, that substantial influence has actually been exercised over the policies and actions of the public utility, the State Commission proposes, in fixing the rates of the Chicago District Company, completely to disregard the contract price at which appellant sells gas to the Chicago District Company. The Commission asserts that it intends to determine from the statistical data which appellant is ordered to produce, and from its records, required to be made available, what the appellant should be permitted to receive from the sale of gas in interstate commerce and to permit the District Company to charge that amount as an operating expense rather than the contract price. Rates are then to be fixed for the Chicago District Company which will permit it to pay appellant not the contract price, if the Commission decides that that price exceeds what the Commission determines the appellant should earn, but only the latter. That this is the purpose of the Commission is shown by the citation to the Chicago District Pipeline Company* wherein the Commission declared that

> "A preliminary investigation of the records available to the Commission discloses that the charge for gas purchased by said Chicago District Pipeline Company from Natural Gas Pipeline Company of America is excessive and unreasonable;" (R. 45; this brief 60)

* See Appendix A, this brief page 59 and Record page 44.

The Commission also found in the order here challenged* that

> "It is now imperative that the Commission be advised as to the actual experiences of said Natural Gas Pipeline Company of America and Chicago District Pipeline Company in respect to the sale of gas to the latter by the former". (R. 48, 51; this brief 64, 66.)

In the answer of the appellees in this cause, appellees

> "Allege that in order that said Illinois Commerce Commission might make a complete and proper investigation and determination of the rates and operating expenses of The Peoples Gas Light and Coke Company and Chicago District Pipeline Company, *said Illinois Commerce Commission must determine the reasonableness of said payments by said The Peoples Gas Light and Coke Company to Chicago District Pipeline Company and by said Chicago District Pipeline Company to said plaintiff for natural gas purchased from it. Allege that such investigation and determination requires an investigation into the reasonableness of payments received by plaintiff herein by reason of the common interest hereinbefore alleged,* and Section 8a of the Public Utilities Act provides the lawful and proper means for securing the information necessary to make such determination". (R. 58; Par. 9.)
>
> "Admit that the Illinois Commerce Commission proposes to exercise jurisdiction and control over the plaintiff to the extent authorized in Section 8a of the Public Utilities Act in the manner provided for in the order of the Illinois Commerce Commission entered on March 3, 1937; admit that for the purpose of exercising such jurisdiction and control *the Illinois Commerce Commission proposes to inquire into the earnings, expenses and profits of the plaintiff, the value of its property and investments and the other business affairs of the plaintiff in so far as such earnings, expenses and profits and value of properties and investments and other business affairs relate to transactions with Chicago District Pipeline Company;* admit that it is the avowed intention of said Illinois Commerce Commission to treat the Chicago District Pipeline Com-

* This brief page 62; Record page 47.

pany and the Natural Gas Pipeline Company of America as affiliated corporations within the meaning of Section 8a of the Public Utilities Act". (R. 59, Par. 11.)

The ultimate purpose of the Commission is shown not only by the statements in its orders and answer, quoted above, but by the action already taken by it with reference to the rates of the Chicago District Pipeline Company. In 1933 the Commission reduced the rates of the Chicago District Pipeline Company (R. 48)*. As that company was organized by the distributing companies for the purpose of acting as an intermediary between them and appellant, and has no assets other than its pipelines, no reserve or financial responsibility and no source of income except from the sale of natural gas (R. 74, 75), it had no alternative other than proportionately to reduce its payments to appellant. In 1936 the operating expenses of the Chicago District Pipeline Company were $12,818,713.89, of which amount the sum of $12,362,268.15 was paid to Natural Gas Pipeline Company of America for gas purchased from appellant (R. 48). Any further reduction in the rates which Chicago District Pipeline Company may charge the distributing companies must, likewise, to the extent of the reduction, incapacitate the Chicago District Pipeline Company to perform its contract with appellant, and thus, in like amount, reduce the earnings of the appellant from its interstate business.

Following the action taken by the Commission in 1933, appellant adjusted its contract price to the ability of the District Company to pay under its lower basis of rates, and agreed with the District Company to forbear the collection of a part of the consideration provided by the original contract of July 25, 1931. This agreement of forbearance was dated December 31, 1935 (R. 36) and the Chicago District Pipeline Company was authorized to enter into it by an

* Illinois Commerce Commission Docket Numbers 21261, 2, 3 and 22386, 7, 8, June 16, 1933.

order of the Commission bearing like date.* By its citation to the Chicago District Pipeline Company, involved herein, (R. 44, this brief 59) the Commission, within eleven months of the date of that order, instituted proceedings further to incapacitate the Chicago District Pipeline Company to perform its contract with appellant.

These proceedings are particularly disturbing to appellant in that the Commission has no jurisdiction to *increase* appellant's interstate rates and obviously would not concern itself with appellant's needs in that connection.

Injury to Appellant Resulting From Compliance With the Order.

The injury of which the Court is asked to take cognizance is the damage which will ensue immediately upon compliance with the order already issued. Irreparable loss to the appellant will not await the final incidence of the rate order which the Commission is preparing to make against the Chicago District Company. Great and irremediable damage to appellant's business will be inflicted immediately by compliance with the Commission's interlocutory order. This damage includes the cash outlay involved in compliance, injury to appellant's credit and the effect thereof upon its cost of operation and program of expansion.

The avowed purpose of the Commission is to use the jurisdiction which it purports to have under Section 8a of the Act to require appellant to supply the data necessary to enable the Commission to determine what charges it believes the appellant should make for the gas sold by it in interstate commerce to the Chicago District Company.† This constitutes the establishment of a rate base for the sale of natural gas, and the Court is well aware of the vast

* Illinois Commerce Commission Docket Numbers 21261, 2, 3 and 22386, 7, 8, December 31, 1935.

† See this brief page 9 *et seq.*

amount of labor and expense which is necessarily involved in producing the statistical data essential to that purpose, as shown by its decisions in a series of cases dealing with this very subject.* As to the cash outlay involved in complying with the order of the Commission, it appears from the affidavit of its secretary, a graduate engineer, who made an investigation of the subject, that to produce the data required in the order (which is less extensive than that which the Commission asserts in its answer it intends to require) would cost many times the jurisdictional amount of $3,000 (R. 78). The court below found as a fact "that the matter in controversy, exclusive of interests and costs, exceeds the sum of Three Thousand Dollars ($3,000)". (R. 91).

The largest item of damage which would result to appellant from the enforcement of the order of the Illinois Commerce Commission would be the serious impairment, if not the destruction, of its credit. This is also the subject of affidavit proof (R. 78). It is a matter of common knowledge that appellant's business is a hazardous one and its principal asset, natural gas, a wasting one. The integrity of its large investment depends, among other factors,† upon the reliability of the estimates of its supplies of gas, its ability to protect against wastage, and to utilize the available supplies. It is obvious too, that the business would face complete destruction if natural gas fields were to be found nearer the consuming territory. If there is to be added to these factors the knowledge that each state in which appellant sells its product has the power to pass

* *Western Distrib'g. Co.* v. *Comm'n*, 285 U. S. 119; *United Fuel Gas Company, et al.* v. *Railroad Commission of Kentucky, et al.* 278 U. S. 300; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio*, 292 U. S. 290.

† The natural gas industry is in its infancy. The life of pipelines and pumping stations has not been determined. The hazards from water and sour gas are as yet uncertain quantities. Most of the engineering problems involved in the transportation of gas for long distances by pipelines are still unsolved.

judgment on what appellant should earn and then take action to incapacitate the local utility to pay more than the amount so determined, the adverse effect upon the ability of appellant to finance its operations will be immediate and irreparable.

Appellant requires large sums of money annually for repairs, betterments, and for extensions of its lines and facilities (R. 78). There is an important potential market for natural gas in southern and eastern Wisconsin and in parts of northern Illinois and Indiana. Appellant is confident that natural gas can be supplied to the municipalities and to the many industries located in these areas, as it has been in Illinois, at considerably less cost than the price now paid for artificial gas. If appellant is to extend its services to these markets, as it hopes to do, it must be able to attract large sums of money for additional pipelines and pumping stations (R. 79). It is not denied that if appellant is forced to submit to this order of the Illinois Commerce Commission, which is the first step in the exercise of jurisdiction over appellant, the company will be unable to sell its proposed securities or borrow money to raise sums needed to finance these projects (R. 79). A certain class of investment funds will no longer remain available to this hazardous undertaking if the Public Service Commissions of the several States in which it sells its commodity in interstate commerce shall be held to have the power to pass judgment upon appellant's earnings, and, by control of the local utility to make that judgment effective. Such funds as may continue to be available to the enterprise can be obtained only at higher interest rates.

It should be emphasized that the injury which would be done to the credit of appellant will not await an exercise of the Commission's judgment on the propriety of the appellant's earnings, nor does it depend on whether that judgment shall prove to be adverse. The injury to credit

arises directly and immediately upon submission by the appellant to the Commission's order to produce the facts upon which the administrative judgment is to be exercised.

Reasons Why Arbitrary Action Against Appellant Is Unnecessary to the Proper Regulation of Intrastate Gas Rates.

(a) The appellant is not engaged in a common enterprise with the Chicago District Pipeline Company. Pioneering in the hazardous undertaking of bringing natural gas from Texas to the State of Illinois, the appellant had the right, in the absence of Federal regulation,* to offer its commodity for the price which it deemed proper. This right was subject to this practical limitation, however, that a price must be put upon the commodity which would be less than that of all competing fuels by a sufficient margin to make it necessary and desirable in the public interest that the local utilities be authorized by the State Commission to invest the large sums necessary to enable them to enter into the transaction. The price agreed to by the appellant in the contract of July 25, 1931, met that test and the Commission itself has so found.†

It was necessary under Illinois law for the Chicago District Company to secure from the Commission a certificate of public convenience and necessity authorizing it to construct and operate its pipelines and to carry on the busi-

* See, *Missouri* v. *Kansas Gas Co.* 265 U. S. 298, 308 and this brief pages 38 and 39. H. R. 6586, purporting to give the Federal Power Commission jurisdiction to regulate the rates of interstate pipeline companies, has been approved by the House of Representatives and has been reported favorably out of committee in the Senate and is now pending consideration by the Senate as a whole.

† The large savings which have been accrued to consumers in Chicago (R. 73) shows that as a matter of fact appellant offered its commodity to the Chicago District Pipeline Company at a price substantially below the basis indicated above in order to stimulate the use of the gas in the Chicago metropolitan area. Appellant sought to accomplish a capacity utilization of its line and thus to increase its net through a reduction in the unit price.

ness for which it was organized. It will be shown that in its decision granting the certificate on the ground that the project was in the public interest, the Commission found:

> "(13) that the three distributing utility companies can purchase natural gas from the Chicago District Pipeline Company at a lower rate per therm than they can manufacture or purchase coke-oven or other manufactured gas;
>
> "(14) that by reason of their being able to purchase natural gas from the Chicago District Pipeline Company cheaper than they can make or purchase coke-oven or other types of manufactured gas, the local distributing utilities are able to effect substantial operating economies;
>
> "(15) that because of the present and future operating economies that can be effected by the local distributing utilities purchasing natural gas from the Chicago District Pipeline Company, which is delivered and sold by them to the public for general use, either as straight natural gas or as a mixture of natural and manufactured gas, the transaction by the Chicago District Pipeline Company of the business of transporting and conveying natural gas, by pipe line, and selling and delivering the same for local distribution to the public for general use, tends to promote the public convenience and is reasonably necessary thereto;"*

Subsequently, and despite a precipitous rise in the general price level, the charges for gas made, respectively, by appellant to the Chicago District Company, and by the latter to the distributing companies, were reduced,† thus producing larger economies than those being realized at the time the Commission found the operations of the Chicago District Company to be in the public interest. Up to April 7, 1937, consumers of gas in the City of Chicago alone had

* Order of the Illinois Commerce Commission in Docket 21256, Chicago District Pipeline Company, In the matter of the application of said company for a certificate of public convenience and necessity to operate a gas utility, dated April 26, 1933.

† This reduction was made effective by an agreement to forbear the collection of approximately $1,000,000 per annum of the consideration specified in the supply contract of July 25, 1931. (R. 10, 36.)

benefited by rate reductions made possible by the provisions of said contract, in sums approximating $25,000,000 (R. 72, 73).

(b) The Commission insists that The Peoples Gas Light and Coke Company which distributes to the consumer the gas brought into the State by appellant, has the burden of proof of justifying any increase in its rates, and *it has recently denied an increase sought by that company.** The Commission has also ordered the Chicago District Company *to show cause why its rates* to The Peoples Gas Light and Coke Company *should not be reduced* (R. 44). The Commission's position that the burden is upon the local utility to justify any increase in rates, and to establish the unlawfulness of any proposed reduction in rates, deprives it of any reason or necessity for proceeding against appellant.

If the statutory presumption that the Chicago District Company and the appellant have the status of a common enterprise were true in fact, the Commission could obtain any desired information concerning that enterprise from the local utility. The fact that the presumption is false and arbitrary makes the required information unnecessary and the demand that it be furnished unlawful.

(c) The course was open to the Commission under the statute (Sec. 8a 2 g, h) to conduct an investigation and hearing to determine as a fact whether the appellant were actually exercising substantial influence over the policies and actions of the local utility. The failure to do so does not create the necessity arbitrarily to assume that relationship.

Under these circumstances appellant contends that the earnings and profits received by it under its contract with the Chicago District Company are not of lawful concern to the State Commission, and that if the statute be con-

* See this brief page 17.

strued to authorize the steps taken by the Commission to pass judgment upon appellant's earnings, it inflicts damage upon appellant without due process of law, denies it the equal protection of the laws, and imposes a direct and illegal burden on interstate commerce.

SPECIFICATION OF ERROR.

Appellant relies upon and urges each of the assigned errors listed in appellant's Assignment of Errors (R. 98 to 106). To repeat in this Brief each of the some fifty assignments would serve no useful purpose. Appellant's position may be summarized as follows:

1. Appellant specifies as error the finding of the court below that the order of the Commission is duly authorized by the provisions of Section 8a of the Illinois Public Utilities Act and the refusal of the court to find that the order is not authorized by and is in contravention of the provisions of Section 8a. (Assignments 10 to 14 inclusive, 50, 51.)

2. Appellant specifies as error the refusal of the court to find that Section 8a of the Illinois Public Utilities Act and the order of the Commission is in contravention of the Fourteenth Amendment to the Constitution of the United States and the finding of the court that said statute and order as applied to appellant do not deprive appellant of property without due process of law or deny to it equal protection of the laws. (Assignments 6, 7, 15, 35 and 50.)

3. Appellant specifies as error the finding of the court that the order of the Illinois Commerce Commission is not in contravention of the commerce clause of the Federal Constitution and the refusal of the court to find that the order as applied to appellant imposes a direct and illegal burden upon interstate commerce. (Assignments 6, 7, 34 and 50.)

4. Appellant specifies as error the finding of the court that there is no essential difference between the order of the Commission here complained of and a *subpoena duces tecum*, and the holding that the order of the Commission can

be sustained apart from Section 8a of the Illinois Public Utilities Act. (Assignments 17 to 23 inclusive, 33, 34.)

5. Appellant specifies as error the order of the court denying appellant's application for an interlocutory or preliminary injunction. (Assignments 1, 26 to 32 inclusive, 35, 37 and 50.)

6. Appellant specifies as error the finding of the court that appellant's remedy is not in the Federal Equity courts but is before the Illinois Commerce Commission. (Assignments 21 to 24 inclusive and 48.)

The specifications of error in paragraphs 4 and 6 above may charge the court below with a more precise determination of the issues referred to than are revealed by its memorandum opinion and findings of fact. The finding of the court, specified as error in paragraph 4 above, was definitely made in its memorandum of opinion (R. 89), but in its findings of fact and conclusions of law the court held that the order complained of "was duly authorized by the Public Utilities Act, and especially Section 8a thereof." (R. 97.) The error specified in paragraph 6 above relates to the ambiguous finding of the court in its memorandum opinion that,

> "It is true that a procedure by way of a subpoena duces tecum would be the more usual method, but there is no essential difference between the command of a subpoena duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff preferred to produce its records only in response to a subpoena it might have pointed out this supposed defect of procedure to the Commission. Furthermore, if the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion." (R. 90).

SUMMARY OF ARGUMENT.

PART I—THE SUBSTANTIVE LAW.

Section 8a of the Illinois Public Utilities Act does not authorize the order of the Commission. The Commission has mistaken the purpose and scope of the statute. Section 8a, Paragraph 3, purports to give the Commission power to approve and disapprove contracts between affiliated interests *hereafter made*. The contract between appellant and the Chicago District Pipeline Company was executed prior to the enactment of the statute and the Commission has no jurisdiction over that contract. Paragraph 2, which grants the Commission power to investigate transactions between affiliated interests, and upon which the order of the Commission purports to be based, would constitute an unconstitutional delegation of power unless limited to the purposes specified in Paragraph 3. (Pages 25 to 28.)

The provisions of Section 8a of the Illinois Public Utilities Act, as construed and relied upon by the Commission to sustain its order, are in conflict with the Fourteenth Amendment. The Commission construes the statute to extend the *one organization rule* announced in *Western Distributing Co.* v. *Public Service Commission of Kansas*, 285 U. S. 119, to all cases in which two corporate entities involved are related by 10 per cent common stock ownership or one common director or elective officer. Ten per cent common stock ownership and a single common director or elective officer is made the full equivalent of common control and the absence of arm's length bargaining, regardless of what the facts may be. So construed, the statute is arbitrary and capricious in its selection of persons or corporations to be regulated and is unreasonably burdensome without real or substantial relationship to the objects sought to

be attained, and deprives appellant of property without due process of law and denies it the equal protection of the laws. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it is void; legislative fiat may not take the place of fact in the judicial determination of issues. (Pages 28 to 36.)

The order of the Illinois Commerce Commission as applied to appellant imposes a direct and illegal burden upon interstate commerce. The Commission, by the construction which it places upon Section 8a of the Public Utilities Act in the order here complained of, attempts to extend the *one organization rule* by shifting the burden of establishing the reasonableness of the rates of the interstate company from the local utility to the supply company engaged exclusively in interstate commerce. The Commission has no jurisdiction over appellant or over its business. To require appellant to make its books accessible to the employees of the Commission and make the reports demanded by the order of the Commission would be a direct and illegal burden upon interstate commerce. (Pages 37 to 41.)

The order of the Commission is not a *subpoena duces tecum* nor is it in the nature of a *subpoena duces tecum* and cannot be sustained as such. There is no *subpoena* known to the law which is designed or competent to perform the function contemplated by the order of the Commission. The appellees have at no time taken the position that the order was issued as a *subpoena* but they have at all times insisted, and the order itself shows, that it is made in the exercise of a jurisdiction which Section 8a of the Public Utilities Act purports to grant to the Commission. Appellant and the local utility do not constitute *one organization,* that status cannot be created by legislative fiat, and the Commission may not employ the process of *subpoena* to investigate matters with which it has no lawful concern. (Pages 41 to 43.)

PART II—THE PROCEDURAL LAW.

The court erred in passing judgment upon the above questions without hearing the evidence bearing upon those issues. The court in effect decided this case on the merits without giving the appellant an opportunity to be heard. (Page 44.)

The court below should have granted appellant's application for an interlocutory injunction. This Court has held that an interlocutory injunction will be granted when the questions presented are grave and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable. Each of these conditions is satisfied by the facts of this case. (Pages 45 to 47.)

(a) The questions presented are of grave consequence to the appellant and of great public importance. (Pages 47 and 48.)

(b) Injury to the appellant will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor. (Page 49.)

(c) Even if appellees be found entitled to a final decree in their favor upon the trial of the case upon its merits they will not suffer injury in any degree from the granting of the interlocutory injunction here sought. (Pages 50 and 51.)

Appellant is entitled to resort to the Federal Equity Courts for relief from the unconstitutional order of the Illinois Commerce Commission. The Federal Courts sitting in equity will enjoin threatened invasion of rights secured by the Federal Constitution. Because of penalties

provided for disobedience of the orders of the Illinois Commerce Commission, it would be a violation of due process of law to deny appellant the right to maintain this suit in equity. Appellant is not required to apply to the Illinois Commerce Commission for a modification of the Commission's order before seeking relief in the Federal Courts. (Pages 51 to 54.)

ARGUMENT.

PART I.

THE SUBSTANTIVE LAW.

The Order of the Illinois Commerce Commission Is Not Authorized by Section 8a of the Illinois Public Utilities Act.

The Illinois Commerce Commission has mistaken the purpose and scope of Section 8a, the statute does not authorize the order in question, and the Commission has exceeded its jurisdiction.

Paragraph 1 of Section 8a gives the Commission jurisdiction to require the disclosure of the identity in respective interests of those owning any substantial interest in a public utility. Paragraph 2 gives the Commission access to accounts and records of affiliated interests and power to require reports with respect to transactions with such interests and defines the term "affiliated interests," but does not state the purpose for which this power of investigation is to be used. Paragraph 3 requires contracts with affiliated interests *"hereafter made"* to be submitted to the Commission for approval, and provides that contracts not approved by the Commission shall not be effective.* We think it clear that the purpose of Paragraphs 1 and 2 of the statute is to enable the Commission to dispatch the duties imposed upon it by Paragraph 3, that is, to apprise itself of the facts necessary to enable it to pass judgment upon, and approve or disapprove contracts with affiliated interests, *"hereafter made."*

* See Appendix B, page 68 *et seq.*

Appellant's contract with Chicago District Pipeline Company was executed in July, 1931 (R. 10). Section 8a of the Illinois Public Utilities Act was added to the Public Utility law by amendment in July, 1933. Section 8a expressly limits the power of the Commission over contracts to those executed subsequent to the passage of the law, and gives the Commission no jurisdiction over the supply contract between the appellant and the Chicago District Pipeline Company executed prior to its enactment. The Commission has been given no function to perform in respect to appellant's contract and is not authorized by the statute to require the production of the data demanded by its order. Nevertheless, by the construction of the Section which is made the basis of its order, the Commission would make the statute retroactive, giving it exactly the same practical effect in its application to contracts already made as to those "hereafter made" to which it is limited by express terms. The Commission has made it abundantly clear that the data sought will be used to disable the local utility from performing any contract which would be disapproved under Paragraph 3 if hereafter made.

The clear intent of the Act is that the grant of power in Paragraph 2 of Section 8a is to enable the Commission to perform the duty imposed upon it by Paragraph 3 with respect to contracts made *after* the enactment of the statute and not, in effect, practically to nullify that limitation. The power of investigation is not an end in itself; rather, it is a means to an end. It is settled law that power delegated to an administrative tribunal must be exercised pursuant to prescribed standards, and within stated limitations, and the power of investigation is no exception to the rule. It is established by the decisions of this court that the power of any governmental body to have access to books and documents, to investigate and require re-

ports, is limited to the purpose specified in the grant of power.*

Paragraph 2 (Section 8a) which grants the power to investigate the transactions of "affiliated interests" with public utilities does not state the purpose for which that power is to be used, and unless it be assumed that the State unconstitutionally delegated a broad power of investigation† without specifying its purpose or setting up any standards for, or limitations upon its use, we must look beyond Paragraph 2 for a statement of its purpose. That statement of purpose is made in the next succeeding paragraph. Paragraph 3 imposes upon the Commission the duty of passing upon, and approving or rejecting, all contracts between public utilities and "affiliated interests." The power to examine records and require reports is plainly in aid of the discharge of that duty.

The question of statutory interpretation involved in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, is singularly analogous to that presented here. That case arose out of an investigation by the Interstate Commerce Commission which was pursued under the terms of Section 12 of the Interstate Commerce Act. Speaking through Mr. Justice Holmes, the court said:

> "The commission it will be seen is given power to require the testimony of witnesses 'for the purposes of this Act.' The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12" (p. 419).
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> * * * * *
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> "the main purpose of the act was to regulate the in-

* *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306; *International Text Book Company* v. *Pigg*, 217 U. S. 91, 112; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 419; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

† See *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, *infra*.

terstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.'' (pp. 419, 420.)

The purpose of and the limitations upon the power of investigation quoted in Section 12 was found, the Court held, in the immediately following paragraphs:

> ''The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the commission keeping itself informed, etc.'' (p. 420.)

The power granted the Illinois Commerce Commission by paragraph 2 must be construed, we submit, not as unlimited by any legislative statement of its purpose, but strictly as a power granted in aid of the duty delegated to the Commission in the following paragraph of the same section.

The Provisions of Section 8a of the Illinois Public Utilities Act as Construed and Relied Upon by the Commission to Sustain Its Order, Are in Conflict With the Fourteenth Amendment to the Federal Constitution.

Section 8a of the Public Utilities Act permits the Commission to pursue alternative courses,—either to attempt to establish as a fact (2g, h) or simply to assume (2c, f) that the relationship between appellant and the Chicago District Company affected the policies and actions of the latter when the supply contract of July 25, 1931 was ex-

ecuted. In making the order challenged, the Commission chose the latter course, and proceeds on the theory that a ten per cent stock interest, or a director or elective officer in common, is the full equivalent of a finding of fact, after hearing and investigation (pursuant to 2g, h), that substantial influence is actually being exercised over the policies and actions of the local utility.

By its order here complained of the Illinois Commerce Commission seeks to make use of Section 8a of the Public Utilities Act to effect an extension of what, for convenience, we shall call the *one organization rule* announced by this Court in *Western Distributing Company* v. *Public Service Commission of Kansas.* 285 U. S. 119, 124, 126, and other recent decisions* without the essential factual basis from which the rule derives. In the Western Distributing Company case *all* of the stock of a local gas company and *all* of the stock of an interstate pipeline company, supplying gas to the local distributor, was owned by Cities Service Company. The court said, page 124:

> "Having in mind the affiliation of buyer and seller and the *unity of control* thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant (*the local utility*) desired an increase of rates *it* was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. *Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value.* The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority

* For other statements and applications of the rule see *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152; and *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio*, 292 U. S. 398, 414.

whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction." (Italics ours.)

And at page 126:

"The argument is made that the proofs demanded by the Commission will involve an extensive and unnecessary valuation of the pipeline company's property and an analysis of its business, and that this burden should not be thrown upon appellant. Whether this is so we need not now decide. It is enough to say that in view of the relations of the parties, and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, *the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.*" (Italics ours.)

In every instance where this rule has been applied, as in the case just cited, there has been actual unity of control. The State cannot constitutionally create that factual basis by a legislative pronouncement which would make a 10 per cent common stock interest (under 2 c, f) the equivalent of a finding as a fact (under 2 g, h), after investigation and hearing, that substantial control is actually being exercised over the policies and actions of the local utility. On the theory that this legislative declaration is competent to establish a status which does not exist in fact, the Commission asserts that a determination of rates for the local utility, make it imperative that the Commission be advised

as to the earning experience of appellant under its contract with the Chicago District Company, and thus requires an investigation into the reasonableness of the payments received by appellant (R. 48, 51; this brief 64, 66). The power to require the showing demanded in the order is inseparably connected with the absence of arm's length bargaining, and that fact cannot be created by legislative declaration.

These provisions of the statute, construed and relied upon as authority for the order, are arbitrary and capricious in their selection of the persons or corporations to be regulated, are unreasonable and burdensome, are without real or substantial relationship to the object sought to be attained, and therefore deprive appellant of property without due process of law, and deny it the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States.*

A ten per cent common ownership of the stock of two corporations, or the existence of a common director or elective officer, may not be made arbitrarily to establish the absence of arm's length bargaining in business transactions between them, contrary to the fact. There might well be forty-nine per cent common stock ownership and yet the most rigid arm's length bargaining between the two corporate entities involved. The courts, and such administrative bodies as the Interstate Commerce Commission and the Federal Trade Commission have repeatedly held, as a fact, after investigation and hearing that 35%, 40% or 45% com-

* Recent decisions holding that due process requires (1) that the regulation shall not be arbitrary or capricious, either in its selection of the persons or corporations to be regulated or in the regulations imposed, and (2) that it be not unreasonably burdensome or without real or substantial relationship to the object sought to be attained, are: *Chicago Burlington & Quincy Railway* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Railroad Retirement Board* v. *Alton*, 295 U. S. 330, 347-348, note 5; *Nebbia* v. *New York*, 291 U. S. 502, 525; *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311. The restraint imposed upon legislation by the due process clauses of the Fourteenth and Fifth Amendments is the same. *Heiner* v. *Donnan*, 285 U. S. 312; see *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24, 25; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450.

mon stock interest had not, in the particular instance under scrutiny, produced unity of control, or an absence of arm's length bargaining.* The question of fact which exists in every case may not be resolved by an arbitrary selection or classification of the persons to be subject to regulation.

Section 8a arbitrarily assumes that in cases of ten per cent common ownership, and in cases in which the two companies have one director in common, the parties are not dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition. This assumption is unreasonable, arbitrary, *and, in the instant case, false.* Appellant alleges, and if given an opportunity will prove, that the contract of July 25, 1931 was executed only after the most rigid and prolonged bargaining at arm's length, in the general and open market, subject to the usual safeguards of bargaining and competition, and that the appellant all but abandoned its negotiations with the Chicago District Pipeline Company with a view to finding other markets for its gas before the parties at length came to an agreement. The statute and order here involved would preclude the appellant from making this showing and would require a presentation of evidence by appellant which this court recognized in the *Western Distributing Company Case* should not be required under the facts presented here.

This Court has held on many occasions that a statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment, and that legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty and property. In

* See, for example, *Re Purchase of Stock of C. & A. R. R. by Rock Island*, Finance Docket No. 2159, 72 Interstate Commerce Commission Reports, 273; *In re DeKalb-Ogle Telephone Company*, Docket No. 3312, before the Federal Communications Commission, decided September 9, 1936; and *In re Intra State Telephone Company*, Docket No. 3310, before Federal Communications Commission, decided August 13, 1936.

Western & Atlantic Railroad v. *Henderson,* 279 U. S. 639, 642, the Court said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In *Manley* v. *State of Georgia,* 279 U. S. 1, 6, it was held:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* v. *Alabama,* 219 U. S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. '* * * it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86."

In *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, the Court said:

> "The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. *Mobile, J. & K. C. R. Y. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Bailey* v. *Alabama,* 219 U. S. 219, 238; *Lindsley* v. *Natural Carbonic Gas Co., supra,* at pp. 81, 82; *Manley* v. *Georgia,* 279 U. S. 1, 5, 6; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642."

In *Heiner* v. *Donnan,* 285 U. S. 312, 329, it was held:

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey* v.

> *Alabama*, 219 U. S. 219, 238, *et seq.*, *Manley* v. *Georgia*, 279 U. S. 1, 5-6. 'It is apparent,' this court said in the Bailey case (p. 239) 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions'."

See also, to the same effect, *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 239; *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418, 458; and *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215.

When the presumption is created arbitrarily without regard to the facts it is bad whether treated as a rule of evidence or of substantive law. The Court was clearly concerned with substantive law in the *Hoeper* v. *Tax Commission*, 284 U. S. 206. In *Heiner* v. *Donnan*, 285 U. S. 312, an Act of Congress created a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death and the *res* subject to the graduated death transfer tax. It was contended that this was a rule of substantive law and, regarded as such, should be upheld. The Court held that the statute was unconstitutional whether it created a rule of evidence or a rule of substantive law, and that the statute would be no less objectionable even though it, in terms, imposed a transfer tax on all gifts made within two years of death. The Court said, page 329:

> "However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization.
> • • •

> "If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

Nor can the statute be justified on grounds of convenience. In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, a statute which raised a presumption that all gifts made within six years of death were made in contemplation of death was defended on the ground that it was required by convenience, and necessary in order to prevent evasion of inheritance taxes. The Supreme Court said, page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A.' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

Similar arguments were rejected in *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215; and *Heiner* v. *Donna*, 285 U. S. 312, 328. In the last cited case this Court said:

> "This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty—a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court in the Schlesinger (p. 240) and Hoeper (p. 217) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity."

There is significance in the general similarity and one vital difference, between Section 8a of the Illinois Public Utility Act and certain provisions of the Federal Public

Utility Holding Company Act of 1935. In the Federal Act a "holding company" is defined to include: (1) any company which controls ten per centum or more of the stock of a public utility (Sec. 2 (7) A—15 U. S. C. A. 79b); (2) anyone which the Commission determines after notice and an opportunity for hearing is exercising a controlling influence over a public utility (Sec. 2 (7) B—15 U. S. C. A. 79b). In principle and in form, provision (A) thus conforms to 2 (c, f) of Section 8a, and provision (B) to Section 8a 2 (g, h). The vital difference between the two statutes which is of significance here is that unlike Section 8a (c, f), the arbitrary nature and effect of which is left wholly untempered, the corresponding provision of the Holding Company Act (Sec. 2 (7) A) is subject to the following:

> "The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) etc." (Sec. 2 (7) B—15 U. S. C. A. 79b).

In so far as the appellant is deprived of its property without due process of law, while other persons, having in fact the same status escape the operation of the statute, the appellant is deprived of the equal protection of the laws. *Chicago, etc. Railway Co.* v. *Minnesota,* 134 U. S. 418, 458.

The order of the Commission rests upon a statute which is repugnant to the Fourteenth Amendment and should be enjoined.

The Order of the Illinois Commerce Commission, as Applied to This Appellant, Is In Contravention of the Commerce Clause of the Constitution of the United States.

Section 8a of the Illinois Public Utilities Act as construed by the appellees, and the order of the Commission here complained of, attempt to extend the common enterprise rule by placing the burden upon appellant, the interstate supply company not doing business in the state nor subject to the jurisdiction of the Commission, to establish the reasonableness of the contract rate at which it sells to the local utilities. In the *Western Distributing Company case** and the other cases in which the common enterprise rule has been given application by this court, it was the *local distributing company,* subject as such to the jurisdiction of the Commission, that was required to show the reasonableness of the earnings of the enterprise as a whole. The court said, in the *Western Distributing Co. case*:

> "Having in mind the affiliation of buyer and seller and the *unity of control* thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant (*the local utility*) desired an increase of rates *it* was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate." (p. 134)

But in this case the Illinois Commission would require the nonregulated interstate company to establish the reasonableness of the earnings accruing to it from sales, in interstate commerce, to the local utilities. By this order the Commission exceeded its powers and imposed an illegal burden upon interstate commerce.

That the sale, transportation and delivery of natural

* Western Distributing Company v. Public Service Commission of Kansas, 285 U. S. 119. Smith v. Illinois Bell Telephone Co. 282 U. S. 133, 152; and Columbus Gas & Fuel Co. v. Public Utilities Comm'n. of Ohio, 292 U. S. 398, 414.

gas in interstate commerce is not subject to state regulation or interference is established by a long line of decisions of this Court. In *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245, the Court said:

> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state."

In *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 307, 308, this Court said:

> "Transportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. * * * The commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce * * * and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve."

In *State Commission* v. *Wichita Gas Co.*, 290 U. S. 561, 563, the Court said:

> "But the sale, transportation and delivery of natural gas by the pipe line company to the distributing companies constitutes interstate commerce and therefore the state is without power to prescribe rates or prices to be charged therefor."

See also *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell* v. *Natural Gas Co.*, 224 U. S. 217; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465.

Nor does the fact that Congress has not seen fit to regulate the interstate transportation of gas warrant the State of Illinois in exercising jurisdiction over appellant. This line of reasoning was rejected by this Court in the case of

Missouri v. *Kansas Gas Company*, 265 U. S. 298, 308, where the Court said:

> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. See *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 493."

Where a company is engaged in both inter and intrastate commerce, and its intrastate commerce is subject to state regulation, any indirect burden upon its interstate commerce which results from, or is incidental to, the lawful regulation of its intrastate business, is not prohibited by the Constitution. We are not concerned with that situation in the instant case. Appellant is not engaged in intrastate commerce; no part of its business is subject to state regulation; its commerce is wholly interstate and national in character. Any interference with its business, any burden upon its commerce, is a direct and illegal burden upon interstate commerce, regardless of the degree of that interference or the extent of the burden. As was said in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 249, 259.

> "The action of the state as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree."*

The rule controlling in this case is that announced by this Court in *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 112. In that case the Court held that a statute requiring a foreign corporation to file certain schedules with the Secretary of State as a condition precedent to the right to do business in the state is unconstitutional. The informa-

* Compliance with the Commission's order will result in great damage and harm to appellant and to its interstate business. The nature and extent of the appellant's damage which would result from compliance with the order of the Illinois Commerce Commission is discussed on pages 12 to 15 of this brief.

tion required by the statute involved in that case was not confidential as is the information demanded by the Illinois Commerce Commission, nor would the filing of such schedules ordinarily result in anything like the damage to the foreign corporation in question as enforcement of the order of the Illinois Commerce Commission will cause appellant in the present case. Yet, this Court said:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But *such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation.*"

This language has been quoted with approval by this Court in many subsequent cases.* Its application to the instant case is unmistakable. The State of Illinois confessedly may not control by legislation the rates or profits of Natural Gas Pipeline Company of America.† To require the appellant to make and file schedules and statements setting forth facts which are not within the jurisdiction of the Illinois Commerce Commission is an illegal burden and interference with interstate commerce. Here, as in the cases cited, unless relief is granted, the appellant's only alternatives to a withdrawal from the pursuit of its interstate business in Illinois, is to suffer the threatened penalties, or to sustain the irreparable injury which flows from compliance with the order.

The precise situation with which we are involved was before the Supreme Court of Missouri in the case of *State* v. *Public Service Commission*, 337 Mo. 809; 85 S. W. (2) 890.‡

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* To the same effect are *Buck Stove Company* v. *Vickers*, 226 U. S. 205, and *International Text Book Company* v. *Lynch*, 218 U. S. 664.

† See cases cited on pages 38 and 39 of this brief.

‡ Petition for writ of certiorari denied, *Public Service Commission, et al.* v. *Missouri ex rel. Cities Service Gas Co.*, 296 U. S. 657.

The Missouri Public Service Commission had directed the Cities Service Gas Company, an interstate pipeline company, to file schedules of rates. The appellant company was engaged in the sale and transportation of natural gas from a point outside the State of Missouri to industrial plants and local distributing companies within the State of Missouri. The order of the Missouri Commission did not purport to regulate the rates charged by the interstate company, nor to require a valuation of its properties, but merely directed the appellant company to file schedules of the rates it charged to distributing companies and industrial concerns. The Circuit Court had sustained the order of the Commission. The Supreme Court of Missouri held the order void as an illegal interference with interstate commerce. The Court said, page 898:

> "We think that the Pipeline was engaged in interstate commerce and that it was not subject to the jurisdiction of the Commission. From what we have said, it follows that the judgment of the Circuit Court should be reversed. It is so ordered."

The Court Below Erred if It Sustained the Order on the Ground That It Was a Process in the Nature of a Subpoena.

The theory on which the court below denied appellant's application for an interlocutory injunction is not altogether clear. In its memorandum opinion the Court declared that the order of the Commission "is not dependent upon the validity of the Illinois statute *which seems to be particularly relied upon by counsel, or the Illinois Commerce Commission*" (R. 89), but added in the same opinion that:

> "It is true that a procedure by way of a subpoena duces tecum would be the more usual method, but there is no essential difference between the command of a subpoena duces tecum and the order of the Commission which is sought to be restrained. If the plaintiff

> preferred to produce its records only in response to a subpoena it might have pointed out this supposed defect of procedure to the Commission."

Recognizing that infirmities were encountered in the treatment of the order as a subpoena, the Court concluded:

> "If the order is somewhat broader than may be necessary, this, likewise, could have been pointed out to the Commission by way of motion."

After this memorandum had been mailed to counsel, the attorneys for the Illinois Commerce Commission prepared and submitted to the court, Findings of Fact and Conclusions of Law which were thereafter signed by the court, and in which the court found that the order of the Illinois Commerce Commission was authorized by Section 8a of the Public Utilities Act (R. 97).

The appellees have at no time taken the position that the order was issued as a subpoena under the provisions of the Act authorizing the issuance of the subpoenas, but on the contrary, have at all times insisted (R. 60), and the order itself shows (R. 50, this brief, 64, 66) that it is made in the exercise *of jurisdiction* which Section 8a of the Public Utilities Act purports to grant to the Commission in specific terms.

The Commission is given undoubted authority by the Public Utilities Act to subpoena evidence which is relevant and material to any proceeding pending before it over which it has jurisdiction,* but the order of the Illinois Commerce Commission complained of here is not a subpoena; it is an attempt to exercise jurisdiction over appellant. The Commission is not demanding the production of any document or paper now in the possession of the appellant, but is requiring appellant to keep its books and records constantly open and accessible to the Commission and its

* Sections 64 and 66 of the Illinois Public Utilities Act, which provide for the issuance of subpoenas and for the production of documentary evidence are set out in full in Appendix B, pages 70 to 73.

agents, and to prepare schedules and reports of property values, costs, operating expenses, profits and other data as a basis for an exercise of judgment by the Commission as to the reasonableness of the appellant's earnings. In directing appellant to make available its books for examination at any time by its officers and agents the Commission is asserting the same jurisdiction over the books and records of the appellant that Section 63 of the Illinois Public Utilities Act* gives the Commission over the books, accounts and records of public utilities engaged in intrastate commerce and subject to the jurisdiction of the Commission. There is no subpoena known to the law which is designed or competent to perform such a function.

Moreover, the business of the Chicago District Company and of appellant do not constitute a common enterprise, so that the data and information required to be produced by the order cover matters which are not of lawful concern to the Commission and into which it may not inquire. Under these circumstances, the order is equally bad whether it be regarded as a process in the nature of a subpoena or as an exercise of jurisdiction, as it in fact is, under Section 8a of the Illinois Public Utility Act. In other words, the court was in error in its belief that the fundamental weakness of the Commission's order when viewed as an exercise of jurisdiction conferred by Section 8a could be avoided merely by regarding it as a process in the nature of a subpoena.

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* See Appendix B, page 73.

PART II.

THE PROCEDURAL LAW.

The Denial of Appellant's Application for an Interlocutory Injunction Was an Improvident Exercise of Judicial Discretion.

The Court below erred in holding that the order of the Commission was authorized by Section 8a and that the provisions of Section 8a, relied upon by the appellees to sustain the order are constitutional, without permitting appellant to introduce evidence demonstrating that Section 8a as applied to appellant in the Commission's order deprives appellant of property without due process of law and denies it the equal protection of the laws. The Court erred in holding that the order of the Commission does not contravene the commerce clause without giving appellant an opportunity to prove that the enforcement of the order will directly burden and obstruct appellant's interstate commerce. The Court erred in holding that the order could be sustained apart from Section 8a of the Illinois Public Utilities Act without allowing appellant to prove that under the decisions of this Court there is no basis in fact for the order. The right of the Commission to investigate the reasonableness of appellant's profits in proper proceedings and in a lawful manner can only be determined by a trial on the merits. This Court held in the *Western Distributing Company case,* 285 U. S. 119 that a presentation of evidence such as is demanded by the order of the Illinois Commerce Commission,

> "*would not be required in the case of parties dealing at arm's length* and in the general and open market subject to the usual safeguards of bargaining and competition."

Appellant stands ready and willing to prove that the contract between the appellant and the Chicago District Pipeline Company was executed by parties dealing at arm's length and in the general and open market subject to the usual safeguards of bargaining and competition. Instead of summarily foreclosing appellant on these important issues, the Court below should have granted appellant an interlocutory injunction and set the case for hearing on the merits.

An interlocutory injunction will be granted when the questions presented are grave and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable.

An application for an interlocutory injunction is addressed to the sound discretion of the trial court; however, this Court has established a definite rule to be applied in the exercise of that discretion, and if such discretion is improvidently exercised or abused the decision of the lower court will be reversed.

The rule to be applied in the determination of an application for an interlocutory injunction is stated in *Ohio Oil Company* v. *Conway*, 279 U. S. 813, 815, where this Court said:

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied, and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by a bond, the injunction usually will be granted."

This rule was further amplified and confirmed in *Alabama* v. *United States*, 279 U. S. 229, 230, where it is said:

> "It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; 2 High on Injunctions (4th Ed.) Sec. 1696. And see *Rice & Adams Corporation* v. *Lathrop*, 278 U. S. 509. The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co.* v. *Conway*, post, p. 813.
>
> "That the doctrine to be allowed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt. *United Fuel Gas Co.* v. *Public Service Commission of West Virginia*, 278 U. S. 322, 326; *Chicago, G. W. Ry.* v. *Kendall*, 266 U. S. 94, 100. The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused."

An application of the rule stated in these decisions to a case very similar to the one with which we are involved will be found in *Foster Packing Co.* v. *Haydel*, 278 U. S. 1 in which this Court reversed an order of the District Court of three judges which had refused a temporary injunction in a suit to restrain the enforcement of the Louisiana "Shrimp Act." The Court said, page 13:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. *Penna* v. *West Virginia, supra. Oklahoma* v. *Kansas Nat. Gas Co., supra.* The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction

is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

It appears by these decisions that an interlocutory injunction will be granted,

(a) If the questions presented are of grave consequence to the applicant and of great public importance;

(b) If injury to the moving party will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor; and

(c) If the injury to the defendant will be inconsiderable if the application for interlocutory injunction is granted and final decree be in its favor.

It is respectfully submitted that each of these conditions is satisfied by the facts in the instant case, that the order of the lower court refusing appellant's application for an interlocutory injunction was an improvident exercise of judicial discretion and that the decision of that court should be reversed.

(a) The questions presented in this case are of grave consequence to the appellant and of great public importance.

The importance of the case to appellant has already been stated.* Unless the decision of the court below denying appellant's application for an interlocutory injunction is reversed, appellant will be compelled to comply with the order of the Illinois Commerce Commission without a trial on the merits. The damage which will result to appellant from compliance with the order would be great and irreparable. The nature and extent of appellant's damage has been stated elsewhere herein (pages 12 to 15).

The public importance of the questions involved in this cause is not easily overstated. The so-called one organization rule as laid down by this Court was universally thought to be an important and far reaching development of

* See pages 12 to 15, *supra*.

public utility and rate-making law, but the expansion of that doctrine by legislative enactment in the manner attempted in the instant case would revolutionize all established concepts of the limits on the power of the states in this field of the law.

By the challenged order, appellant is directed to make its records available to the Commission and to prepare and submit such reports and data as are deemed essential by the Commission to enable it to exercise a judgment as to the reasonableness of the earnings which appellant derives from its interstate sales to the local utility. It is asserted that the statute authorizes such an order against any corporation related to a local utility by ten per cent common stock interest, or by one common director. It may be fairly and safely assumed that local utilities operating everywhere within the respective states are, like the Chicago District Company, constantly purchasing supplies from companies which operate solely in interstate commerce and are thus, by all previously accepted standards, free from interference or regulation by the states. If the State of Illinois may assume jurisdiction over appellant because of a ten per cent common stock interest which can be shown to have had no effect upon the relations between it and the local utility, it may do so on the basis of a two per cent interest, or indeed, without resort to any such artificial and arbitrary classification, with the result that every company doing business solely in interstate commerce may be required by the state to establish the reasonableness of the earnings which it receives from transactions with local utilities. The far reaching question whether any such power exists in the state is obviously one of great public importance.

(b) Injury to the appellant will be certain and irreparable if the application for interlocutory injunction is denied and final decree be in its favor.

The nature and extent of the damage to appellant which would result from the enforcement of the order of the Commission is discussed on pages 12 to 15 of this brief.

Compliance with the Commission's order must of necessity immediately follow the denial of appellant's application for an interlocutory injunction. Sections 76 and 77 of the Illinois Public Utilities Act* provide a maximum penalty for violation of the orders of the Illinois Commerce Commission of $2,000 per day for each day of continuing disobedience, and a fine of $1,000 and one year's imprisonment for each officer, agent, attorney or other person who procures, aids or abets such disobedience. These penalties are so drastic and severe that if an interlocutory injunction is denied appellant must yield to an order of uncertain legality, rather than to suffer their infliction. The enforcement of the order has been restrained by order of this court, but compliance with the Commission's order must of necessity immediately follow an affirmance of the order of the three judge court denying appellant's application for an interlocutory injunction. Unless the enforcement of the order of the Illinois Commerce Commission is restrained pending the trial on the merits, appellant will be compelled to comply with the Commission's order without an opportunity first to test its constitutionality.

Due process of law requires that appellant be permitted to resort to a court of equity fully to test the lawfulness of the order involved in this case without the risk of incurring the penalties provided by the Illinois Public Utilities Act,† but appellant is deprived of this remedy without the protection of an interlocutory injunction.

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* These sections are set out in full in Appendix B, this brief, pages 74 and 75.

† *Ex Parte Young*, 209 U. S. 123, 165; *Wadley & Southern Ry. Co. v. Georgia*, 235 U. S. 651, 662, 666. See this brief, pages 52 and 53.

(c) Even if appellees be found entitled to a final decree in their favor upon the trial of the case upon its merits they will not suffer injury in any degree from the granting of the interlocutory injunction here sought.

The granting of an interlocutory injunction will not adversely affect the public interest. The citation directed to the Chicago District Pipeline Company* is to show cause why its rates should not be reduced. That proceeding, in which the order complained of was entered, is shown to be collateral to a rate case, involving The Peoples Gas Light and Coke Company (R. 45; this brief 60) and was instituted in support of a denial of a rate increase proposed by the Peoples Gas Light and Coke Company. That proceeding before the Commission has been finally determined. The Commission has entered a final order denying the petition of The Peoples Gas Light and Coke Company for an advance in rates for gas service in Chicago.† A collateral proceeding filed in the Circuit Court of Cook County to restrain the Commission from suspending the proposed rate increase of The Peoples Gas Light and Coke Company‡ has been tried before a Master in Chancery. The Master has made his report to the Circuit Judge, who holds the matter under advisement pending final judgment.

There is no pending proceeding involving rates of distributors to the consuming public of the State of Illinois in which the information demanded by the Illinois Commerce Commission of this appellant could now be used. An inter-

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* See Appendix A, this brief, page 59.

† The Peoples Gas Light and Coke Company in the matter of its petition for a proposed advance in rates, Illinois Commerce Commission Docket 24792; final order entered denying the petition on May 21, 1937.

‡ *Peoples Gas Light and Coke Company* v. *Slattery, et al.*, in the Circuit Court of Cook County, No. 36C 9986. The order of the Circuit Court granting the distributor an interlocutory injunction pending a trial on the merits was reversed by the Appellate Court of Illinois in the case of *Peoples Gas Light and Coke Company* v. *Slattery*, 287 Ill. App. 379, 5 N. E. (2) 285; appeal to the Supreme Court of Illinois dismissed October 5, 1937.

locutory order enjoining the enforcement of the order of the Illinois Commerce Commission until the court can inquire into the constitutionality of that order, on the basis of a full presentation of the facts, can result in no damage to consumers of gas in the State of Illinois, nor to the Illinois Commerce Commission. On the other hand, as pointed out above, the denial of such application would cause the appellant irreparable harm and injury.

Appellant Is Entitled to Resort to the Federal Equity Courts for Relief from the Unconstitutional Order of the Illinois Commerce Commission.

The Federal Courts sitting in equity will enjoin threatened invasion of rights secured by the Federal Constitution.

In *Sterling* v. *Constantine,* 287 U. S. 378, 393, the Court said:

> "The applicable principle is that where State officials, purporting to act under State authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the persons injured may have appropriate relief."

In *Terrace* v. *Thompson,* 263 U. S. 197, 214, the Court said:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity."

In *Cavanaugh* v. *Looney,* 248 U. S. 453, 456, the Court said:

> "It is now settled doctrine 'that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and

> who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action' ".

Section 266 of the Judicial Code* also, by implication, authorizes suits of this kind.

Because of penalties provided for disobedience of the orders of the Illinois Commerce Commission, it would be a violation of due process of law to deny the appellant the right to maintain this suit in equity.

Sections 76 and 77 of the Illinois Public Utilities Act† provide a maximum penalty for violation of the orders of the Illinois Commerce Commission of $2,000 per day for each day of continued disobedience, and a fine of $1,000 and one year's imprisonment for each officer, agent, attorney or other person who procures, aids or abets such disobedience. These penalties are so drastic and severe that it is better for appellant to yield to an order of uncertain legality than to ask the protection of the law at the risk of their infliction.

Due process of law requires that appellant be permitted to resort to a court of equity to test the constitutionality of the statute and the order involved in this case without the risk of incurring these onerous penalties. In *Ex Parte Young,* 209 U. S. 123, 165, this Court said:

> "To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risks of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

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* 28 U. S. C. A. 380.

† See Appendix B, this brief, pages 74 and 75, where these sections are set out in full.

And in *Wadley Southern Railway Co.* v. *Georgia,* 235 U. S. 651, the Court said, page 662:

> "A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

After discussing the more important decisions on this subject, the Court said, page 666:

> "In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) *would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself."*

Appellant is not required to apply to the Illinois Commerce Commission for a modification of the Commission's order before seeking relief in the Federal Courts.

In *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 48, the Court said:

> "It was not necessary that the Company should apply to the Commission for a rehearing before resorting to the court. While under the Public Service Commission law, any person interested in an order of the Commission has the right to apply for a rehearing,

the Commission is not required to grant such rehearing, unless, in its judgment, sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement, except as the Commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order. As the law does not require an application for a rehearing to be made, and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order. (Citing Cases.) In *Palermo Land & Water Company* v. *Railroad Commission*, 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the Commission unless an application for a rehearing had been made. Here the Commission did not suggest in its answer that it perceived any ground upon which it would have granted a rehearing if an application had been made; but, on the contrary, maintained the correctness of its orders in all respects. Manifestly, under such circumstances, the injunction should not have been denied merely because application had not been made to the Commission for a rehearing.

"And for like reasons it was not necessary that the Company should have exercised the privilege granted by one of the orders of applying to the Commission for modification of the classification."

The Illinois statute is precisely the same in all material respects as the one under consideration in the *Prendergast* case; and the Illinois Commission has, in its answer, maintained the correctness of its order in all respects. Our case is on all fours with the *Prendergast* case.

See also *Banton* v. *Belt Line Railway*, 268 U. S. 413, 416, where the Court said:

"No application to the commission for relief was required by the state law. None was necessary as a condition precedent to the suit. See *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 48; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 282."

CONCLUSION.

I.

1. The order complained of rests upon a misconstruction of the statute. An investigation is not an end in itself; to be valid it must be a means to a lawful end. The grant of the power must be accompanied by a statement of its purpose. The power to require the submission of records and reports granted by paragraph 2 (Section 8a) which contains no statement of its purpose must be interpreted as being granted solely to enable the Commission intelligently to discharge the duty imposed by the next succeeding paragraph of the Act.

It is shown by the order itself, by the citation initiating the case in which the order was issued, and by the answer, that the Commission seeks to use the required information for a very different purpose, namely, to give the statute the same practical effect with respect to contracts made prior to its enactment as paragraph 3 declares it shall have with respect to contracts made after its enactment. This is in conflict with the clear intent of the statute and the order should be enjoined on the ground that it exceeds the statutory power of the Commission.

2. By the order complained of the Commission is preparing to pass judgment on the earnings of appellant on the theory that it and the Chicago District Company have the status of a common enterprise. The order rests upon a statute which purports to create a factual basis for that action which in truth does not exist. By legislative declaration a ten per cent common stock interest is sought to be made the full equivalent of "a finding, as a fact, after investigation and hearing that substantial influence is actually being exercised over the policies and actions" of the local utility. Here there has been no investigation, no hear-

ing, no finding of fact. The presumption created is false, but the statute gives appellant no opportunity to rebut it. So construed and applied the state is arbitrary and capricious, takes appellant's property without due process of law, and denies it the equal protection of the laws.

3. The statute as construed and applied by the order of the Commission, would require one engaged solely in interstate commerce to present evidence necessary to enable the State to pass judgment on its earnings and profits, and imposes a direct burden upon interstate commerce.

The issue is one of far-reaching public importance. The State is asserting a purpose to pass judgment upon the reasonableness of profits accruing to appellant from sales in interstate commerce to a local utility. It predicates the right to do so on a presumption as to the relationship between the parties which is false in fact. If the State may do this, it may do it without resorting to the fiction created here. The question, therefore, is whether a State shall have the power to pass judgment upon the reasonableness of the profits of all who make sales in interstate commerce to a local utility, and to require the interstate company to prepare and submit the evidence necessary to the exercise of that judgment.

Compliance with the order would inflict immediate, great, and irreparable injury upon the appellant, and we respectfully submit that it should be enjoined.

II.

The court below, without hearing any evidence, has held the order of the Illinois Commerce Commission here complained of to be a valid order within the jurisdiction of the Commission. Without a trial on the merits the court has held the order to be authorized by Section 8a of the Public Utilities Act and has sustained the constitutionality of that Act as applied to appellant. Appellant is prepared to prove that there is and was no common control of ap-

pellant and the Chicago District Pipeline Company, that the supply contract of July 25, 1931 between the appellant and Chicago District Pipeline Company was executed after arm's length bargaining in the open market, subject to the usual safeguards of bargaining and competition, and that the statute as interpreted by the Commission and as applied to the appellant in the Commission's order, is unreasonable, arbitrary and void, and imposes a direct and illegal burden upon interstate commerce. The court in effect decided this case on the merits without hearing any of the evidence.

The court further erred in denying plaintiff's application for interlocutory injunction pending a trial on the merits. This Court has held that an interlocutory injunction will be granted where the questions presented are grave, and the injury to the moving party will be certain and irreparable if the application be denied, and final decree be in its favor, while if the injunction be granted the injury to the opposing party, even if final decree be in its favor, will be inconsiderable. Each of these conditions is satisfied by the facts in the instant case.

Respectfully submitted,

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APPENDIX A.

The Citation and Order of the Illinois Commerce Commission Involved in This Case.

(See Record pages 44 to 51.)

STATE OF ILLINOIS,

ILLINOIS COMMERCE COMMISSION.

Illinois Commerce Commission, On its own motion *vs.* Chicago District Pipe Line Company. Citation to show cause why there should not be a reduction in rates charged for natural gas to distributing companies in the State of Illinois.	25218.

CITATION.

WHEREAS, it is the duty of this Commission, as a regulatory body, to institute investigations of the utilities under its jurisdiction from time to time to determine whether the rates charged are just and reasonable; and

WHEREAS, the Chicago District Pipe Line Company supplies natural gas to Peoples Gas Light and Coke Company, Western United Gas and Electric Company, and Public Service Company of Northern Illinois at rates filed with

this Commission pursuant to an order which specifically provided "that the consent herein should be granted with the express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipe Line Company;" and

WHEREAS, there is now pending before this Commission Case No. 24792, being The Peoples Gas Light and Coke Company in the matter of proposed advances in rates for gas service in Chicago, stated in Rate Schedule Ill. C. C. No. 19 rendered by said company; and

WHEREAS, one of the largest items of operating expense of said People Gas Light and Coke Company is the cost of natural gas purchased by it from Chicago District Pipe Line Company being in excess of $10,000,000 per year; and

WHEREAS, Chicago District Pipe Line Company, Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company are all affiliates of Natural Gas Pipe Line Company of America which sells gas to Chicago District Pipe Line Company which it, in turn, resells to Western United Gas and Electric Company, Public Service Company of Northern Illinois and Peoples Gas Light and Coke Company; and

WHEREAS, a preliminary investigation of the records available to the Commission discloses that the charge for gas purchased by said Chicago District Pipe Line Company from Natural Gas Pipe Line Company of America is excessive and unreasonable; and

WHEREAS, the cost of gas sold to Chicago District Pipe Line Company by Natural Gas Pipe Line Company of

America is the largest item of operating expense of said Chicago District Pipe Line Company; and

WHEREAS, the determination of the true operating income of Peoples Gas Light and Coke Company depends in part upon the reasonableness of the charges to it for gas sold to it by Chicago District Pipe Line Company; and

WHEREAS, in the opinion of the Commission, the matters above recited constitute good cause why the rates of Chicago District Pipe Line Company should now be investigated and that company should be required to demonstrate that its present rates are not excessive and should not be reduced;

NOW, THEREFORE, BE IT RESOLVED:

That the Chicago District Pipe Line Company should be required to show cause if any there be why its rates charged for gas sold to operating companies should not be reduced.

IT IS THEREFORE ORDERED that the Chicago District Pipe Line Company be and it is hereby cited to appear before the Commission at its offices in the City of Chicago, Illinois, Room 2600, I North La Salle Street, on the 15th day of December, 1936, at the hour of 10:00 A. M. Central standard time, to show cause if any there be why there should not be a reduction in rates charged by it for gas sold to operating companies in the State of Illinois. By order of the Commission at Springfield, Illinois, this 17th day of November, A. D. 1936.

WILLIAM W. HART,
Secretary.

(SEAL)

STATE OF ILLINOIS,

ILLINOIS COMMERCE COMMISSION.

Illinois Commerce Commission, On its own motion *vs.* Chicago District Pipe Line Company. Citation to show cause why there should not be a reduction in rates charged for natural gas to distributing companies in the State of Illinois.	25218.

INTERLOCUTORY ORDER.

By the Commission:

This proceeding was begun by a citation issued by this Commission against the Chicago District Pipeline Company on November 17, 1936, ordering said company to appear and show cause, if any there might be, why there should not be a reduction in rates for gas sold at wholesale by said company to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company.

Hearing in this matter was set for December 15, 1936 and was continued on that date to December 18, 1936. No testimony was heard on that date and the case was again continued to January 13, 1937. On the last mentioned date the company presented two witnesses, Mr. William G. Rudd, Vice-president of the company, and Mr. Frank L. Griffith, Vice-president and Comptroller of the company.

The case was then continued to January 20, 1937, on which date Mr. Frank L. Griffith testified further when the company closed its direct case. Since that time several hearings have been held at which counsel for the Commission has carried on cross examination of company witnesses.

It appears from the testimony in the record that Chicago District Pipeline Company is an Illinois corporation operating as a public utility engaged in the business of supplying gas at wholesale to three operating utility companies who are engaged in the business of supplying gas to consumers in the Chicago area.

The Chicago District Pipeline Company produces no gas but purchases and sells only natural gas which it receives from Natural Gas Pipeline Company of America, taking delivery thereof at the terminus of a 24-inch pipe line from Texas to Joliet, Illinois.

The Natural Gas Pipe Line Company of America is an interstate pipe line operator, which transports natural gas from the fields located in the Panhandle district in Texas through its pipe line to a point located southwest of Joliet in Illinois, where it is delivered to Chicago District Pipeline Company.

The price which Chicago District Pipeline Company pays to said Natural Gas Pipe Line Company of America for this gas is determined by a contract between said Chicago District Pipeline Company and Natural Gas Pipe Line Company of America, which has been introduced in evidence in this case as Company Exhibit 2. It further appears from the record in this case in Company Exhibit 9 that the operating expenses of Chicago District Pipeline Company for 1936 were $12,818,713.89, of which amount the sum of $12,362,288.15 was paid to Natural Gas Pipe Line Company of America for gas purchased from said company under the terms of the contract referred to above.

In cases Nos. 21261, 21262, 21263, 22386, 22387, and 22388, consolidated, testimony on behalf of the respondent here was introduced as to estimated profits of Natural Gas Pipe Line Company of America from said business, and as to the actual profits earned by said company to February, 1932. On the basis of the evidence in those cases the Commission allowed Chicago District Pipeline Company to file the schedule of rates (Company Exhibit 8), which is the subject of investigation here. After three full years of operation under the present arrangement it is now imperative that the Commission be advised as to the experience of these companies with respect to the transactions between them.

It appears from the record that the stock of Natural Gas Pipe Line Company of America is owned and held by six corporations in varying percentages, with Natural Gas Investment Company owning 26.6 per cent of that stock. It further appears that 79.54 per cent of the stock of Natural Gas Investment Company is owned by The Peoples Gas Subsidiary Company, a wholly owned subsidiary of The Peoples Gas Light and Coke Company. The stock of Chicago District Pipeline Company, respondent here, is entirely owned by Natural Gas Investment Company.

It further appears from the record that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company, and also that H. P. Sedwick, one of the Directors of Chicago District Pipeline Company, is also a Vice-President and Director of Natural Gas Pipe Line Company, and a Director of Natural Gas Investment Company.

Section 8a of "An Act concerning public utilities", in force July 1, 1921, as amended, provides (Par. 2):

> "The Commission shall have jurisdiction over affiliated interests having transactions, other than owner-

ship of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the Commission to the the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the Commission may prescribe. For the purpose of this section th phrase 'affiliated interests' means:

"* * * (c) Every corporation, 10 percentum or more of whose voting capital stock is owned by any person or corporation owning 10 percentum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of 10 percentum or more of voting capital stock; * * * (f) Every corporation which has one or more elective officers, or one or more directors in common with such public utility; * * *"

Therefore, the Commission having considered the evidence which has up to now been introduced in this cause is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this proceeding and of the parties involved herein;

(2) that Chicago District Pipeline Company is a public utility under the jurisdiction of this Commission engaged in the business of supplying gas at wholesale to privately owned retailing public utility companies;

(3) that Natural Gas Pipe Line Company of America carries on certain transactions with said Chicago District Pipeline Company, to-wit: the sale of gas by said Natural Gas Pipe Line Company of America to Chicago District Pipeline Company under the terms of a contract dated July 25, 1931 and certain agreements supplemental thereto;

(4) that 26.62 per cent of the stock of said Natural Gas Pipe Line Company of America is owned by Natural Gas Investment Company; that 100 per cent of the stock of Chicago District Pipeline Company is owned by said Natural Gas Investment Company;

(5) that George F. Mitchell, President of Chicago District Pipeline Company, is President and Director of Natural Gas Investment Company and a Director of Natural Gas Pipe Line Company of America;

(6) that H. P. Sedwick is a Director of both Chicago District Pipeline Company and Natural Gas Investment Company and a Vice President and Director of Natural Gas Pipe Line Company of America;

(7) that by virtue of said common ownership of stock and said common directors said Natural Gas Pipe Line Company of America is an affiliate of Chicago District Pipeline Company within the meaning of Section 8a of "An Act concerning public utilities", in force July 1, 1921, as amended;

(8) that Ralph W. Gallagher, then Director of Continental Construction Company (the name of which was later changed to Natural Gas Pipe Line Company of America) was called as a witness by Chicago District Pipeline Company and that he testified as to estimated investment, expenses and earnings of the pipe line project; and that Frank L. Griffith, then Assistant Secretary of Chicago District Pipeline Company and Natural Gas Investment Company, now Director and Vice-President and Director, Vice-President and Comptroller of those companies, respectively, sponsored an exhibit purporting to show the earnings, expense and investment of Natural Gas Pipe Line Company of America as of February 29, 1932;

(9) that it is now imperative that the Commission be advised as to the actual experiences of said Natural Gas Pipe Line Company of America and Chicago District Pipeline Company in respect to the sale of gas to the latter by the former; that the said Natural Gas Pipe Line Company of America should be required to submit reports with respect to such transactions and that the said Natural Gas Pipe Line Company of America should make available to the Commission all accounts and records relating to said transactions, including any accounts and records, any portion of which may be applicable to such transactions.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Natural Gas Pipe Line Company of America be, and the same is hereby, ordered and directed to file

forthwith in this proceeding on or before the Fifteenth (15th) day of March, A. D. 1937, a true and accurate report as to the cost of the property of said Natural Gas Pipe Line Company of America which is used in supplying natural gas to said Chicago District Pipeline Company and a statement of the income and expenses in connection with supplying gas to said Chicago District Pipeline Company, or to report to this Commission in substitution thereof, a true and accurate statement as to the cost of all of its property or properties used by it in the business of transporting and selling natural gas, together with a statement as to the income and expenses for such operations.

IT IS FURTHER ORDERED that the said Natural Gas Pipe Line Company of America make available for the examination of the Commission, or such of its officers, agents and employees as it may designate, all of its accounts and records relating to transactions between the said Natural Gas Pipe Line Company of America and the said Chicago District Pipeline Company, including all accounts and records as to joint or several expenses, any portion of which may be applicable to said transactions.

By order of the Commission at Springfield, Illinois, this Third (3rd) day of March, A. D. 1937.

(Signed) WILLIAM W. HART,
Secretary.

(SEAL)

APPENDIX B.

Provisions of the Illinois Public Utilities Act Referred to in the Foregoing Brief.

Section 8a (Chap. 111⅔, Ill. Rev. Stat. 1937, Sec. 8a):

§ 8a. JURISDICTION OVER STOCKHOLDERS, AFFILIATED INTERESTS—DISCLOSURE OF IDENTITY OF OWNER OF SUBSTANTIAL INTEREST

"(1) The commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the commission to such extent as may be necessary to enable the commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

"(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purposes of this section, the phrase 'affiliated interests' means:

"(a) Every corporation and person owning or holding, directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

"(b) Every corporation and person in any chain of successive ownership of ten per centum or more of voting capital stock;

"(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or

corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

"(d) Every corporation, ten per centum or more of whose voting securities is owned, directly or indirectly, by such public utility;

"(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock;

"(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

"(g) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

"(h) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

"Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

"(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or

exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and approved by the commission. If it be found by the commission, after investigation and a hearing, that any such contract is not in the public interest, the commission is hereby authorized to disapprove such contract; and for the purposes of computing expense of operation in any rate proceeding, all payments under any such contract or arrangement not so filed, or so disapproved or in excess of the amount determined by the commission to be reasonable shall be deemed not to have been paid or charged to operating expenses. Every contract or arrangement not approved by the commission as provided for in this section shall be void.

"(4) The commission shall have authority by general rules applicable alike to all public utilities affected thereby, to waive the filing and necessity of approval of contracts and arrangements described in subparagraph (3) of this section, where the total obligation to be incurred under or by reason of such contract or arrangement shall not be in excess of five hundred dollars ($500). Provided, however, that if the commission, after a hearing, finds that any public utility is abusing such general rule and thereby evading the purposes of subparagraph (3) hereof, the commission shall have power to require such public utility to thereafter file and receive the commission's approval upon all contracts and arrangements described in subparagraph (3) of this section, regardless of amount, and said general rule herein referred to shall remain in full force and effect as to all other public utilities. (1921, June 29, Laws 1921, p. 702, art. I, § 8a, added 1933, July 8, Laws 1933, p. 841, § 1.)

Sections 60 and 62 (Chap. 111-2/3 Ill. Rev. Stat. 1937, Secs. 64 and 66):

"§64. INVESTIGATIONS AND HEARINGS:

"The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any mat-

ters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

"Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

"Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission. (1921, June 29, Laws 1921, p. 702, art. V, § 60.)"

"§ 66. ATTENDANCE OF WITNESSES—PRODUCTION OF PAPERS—DEPOSITIONS:

"All subpoenas issued under the terms of this Act may be served by any person of full age. The fees of witnesses for attendance and travel shall be the same as fees of witnesses before the circuit courts of this State, such fees to be paid when the witness is excused from further attendance, when the witness is subpoenaed at the instance of the Commission, or any commissioner or assistant commissioner: and the disbursements made in the payment of such fees shall

be audited and paid in the same manner as are other expenses of the Commission. Whenever a subpoena is issued at the instance of a complainant, respondent, or other party to any proceeding before the Commission, the Commission may require that the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned, and the Commission shall have power, in its discretion, to require a deposit to cover the cost of such service and witness fees and the payment of the legal witness fee and mileage to the witness when served with subpoena. A subpoena issued as aforesaid shall be served in the same manner as a subpoena issued out of a court of record.

"Any person who shall be served with a subpoena to appear and testify, or to produce books, papers, accounts or documents, issued by the Commission or by any commissioner, assistant commissioner or officer of the Commission, in the course of an inquiry, investigation or hearing conducted under any of the provisions of this Act, and who refuse or neglect to appear, or to testify, or to produce books, papers, accounts and documents relevant to said inquiry, investigation or hearing as commanded in such subpoena, shall be guilty of a misdemeanor.

"Any circuit court of this State, or any judge thereof either in term time or vacation, upon application of the Commission, or a commissioner, assistant commissioner or officer of the commission, may, in his discretion, compel the attendance of witnesses, the production of books, papers, accounts and documents, and the giving of testimony before the Commission, or before any such commissioner, assistant commissioner, or officer, by an attachment for contempt or otherwise, in the same manner as production of evidence may be compelled before said court.

"The Commission or a commissioner, assistant commissioner or officer of the Commission or any party may in any investigation or hearing before the Commission, cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the courts of this State and to that end may com-

pel the attendance of witnesses and the production of papers, books, accounts and documents.

"The Commission may require, by order served on any public utility in the manner provided herein for the service of orders, the production within this State at such time and place as it may designate, of any books, accounts, papers or documents kept by any public utility operating within this State in any office or place without this State, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the Commission or under its direction. (1921, June 29, Laws 1921, p. 702, art. V, § 62.)"

Section 63 (Chap. 111⅔ Ill. Rev. Stat. 1937, Sec. 67).

§67. RIGHT TO INSPECT BOOKS AND PROPERTY AND TO EXAMINE AGENTS OF PUBLIC UTILITIES.

"The Commission, each commissioner, assistant commissioner and each officer and employee of the Commission properly authorized thereby shall have the right, at any and all times to inspect the papers, books, accounts and documents, plant, equipment or other property of any public utility, and the Commission, each commissioner, assistant commissioner, and any officer of the Commission authorized to administer oaths shall have power to examine under oath any officer, agent or employee of such public utility in relation to any matter within the jurisdiction of the Commission. A person other than a commissioner, or assistant commissioner demanding such inspection shall produce under the seal of the Commission his authority to make such inspection. A written record of the testimony or statement so given under oath shall be made and filed with the Commission. Information so obtained shall not be admitted in evidence or used in any proceeding except in proceedings provided for in this Act.

"Any party to a proceeding before the Commission shall have the right to inspect the records of all hearings, investigations or inquiries conducted by or under the authority of the Commission, which may relate to the issues involved in such proceeding; and to submit suggestions as to other matters to be investigated or as to questions to be propounded. If the Commission is satisfied that such suggested investigation should

be made or such suggested questions answered, and that the information desired is within the power of either party to furnish, it shall enter an order requiring the investigation to be made or the questions to be answered, and upon failure or refusal to comply with such order, the Commission shall either refuse to grant the relief prayed for by the party refusing to comply, or may grant the relief prayed for by the opposing party against the party refusing to comply. (1921, June 29, Laws 1921, p. 702, art. V, §63.)"

Sections 76 *and* 77 (*Chap.* 111⅔ *Ill. Rev. Stat.* 1937, *Secs.* 80 *and* 81).

"§80. PENALTY FOR VIOLATION BY PUBLIC UTILITY, OR CORPORATION OTHER THAN A PUBLIC UTILITY, OF ACT OR ORDERS—SEPARATE OFFENSES:

"Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction, or requirement or any part or provision thereof, of the Commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, shall, upon conviction, be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

"Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction or requirement of the Commission, or any part or portion thereof by any corporation or person, is a separate and distinct offense and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

"In construing and enforcing the provisions of this Act relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility acting within the scope of his official duties or employment, shall in every case be deemed to be the act, omission, or failure of such public utility. (1921, June 29, Laws 1921, p. 702, art. V, §76.)

§81. PERSONS VIOLATING ACT OR ORDERS—PENALTY:

"Every person who, either individually, or acting as an officer, agent, or employee of a public utility or of a

corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to obey, observe or comply with this Act or any such order, decision, rule, regulation, direction, or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. (1921, June 29, Laws 1921, p. 702, art. V, §77.)

APPENDIX C.

Distribution of the Stock of the Several Corporations Mentioned in This Brief.

Chicago District Pipeline Company is an Illinois corporation engaged in the sale, transportation and delivery of natural gas within the State of Illinois. This corporation purchases gas from the appellant at points near Joliet, Illinois. Its sole customers in Illinois are Public Service Company of Northern Illinois; Western United Gas and Electric Company; and The Peoples Gas Light and Coke Company. Gas purchased from appellant is delivered to these distributing companies by a system of pipelines. All of the capital stock of the Chicago District Pipeline Company prior to September 1, 1931 was held by Insull Son & Co. Inc., and since September 1, 1931 all or substantially all of said stock has been held by Natural Gas Investment Company.

Commonwealth Edison Company is an Illinois corporation engaged in the manufacture, sale and distribution of electrical energy to industrial, commercial and domestic consumers in the City of Chicago. The stock of Commonwealth Edison Company is not closely held, nor is it controlled by the same person, persons or interests that control any of the other corporations named in this appendix.

Commonwealth Subsidiary Corporation is an investment company organized under the laws of the State of Illinois. All of the outstanding capital stock is held by Commonwealth Edison Company.

Insull, Son & Co. Inc., is a bankrupt investment and holding company organized under the laws of the State of Illinois. All or substantially all of its stock was held by Insull Utility Investments, Inc.

Insull Utility Investments, Inc., was an investment and holding company organized under the laws of the State of Illinois. This company is now bankrupt. Its stock was not closely held, but the company was controlled by Samuel Insull, his family and business associates.

Natural Gas Investment Company is an investment and holding company organized under the laws of the State of Illinois, whose outstanding capital stock is held by the following named corporations in the amounts indicated:

Peoples Gas Subsidiary Corporation, an Illinois corporation 79.54%
Commonwealth Subsidiary Corporation, an Illinois corporation 4.28%
Public Service Company of Northern Illinois, an Illinois corporation 16.18%

Natural Gas Pipeline Company of America, appellant, is a Delaware corporation, organized in 1930, engaged in the sale, transportation and delivery of natural gas from the Panhandle area in Texas to distributors and industrial consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois, by means of a system of pipelines and pumping stations. The outstanding capital stock of appellant at the times hereinafter mentioned was and is held by the following corporations in the amounts indicated, viz.:

	Distribution on July 25, 1931	Distribution on December 31, 1935	Present Distribution
Insull Son & Co., Inc., an Illinois corporation	26.63%	0.00%	0.00%
Cities Service Company, a Delaware corporation	26.63%	26.63%	26.63%
Natural Gas Investment Company, an Illinois corporation.....	0.00%	26.63%	26.63%
The Texas Corporation, a Delaware corporation	17.58%	17.58%	17.58%
Standard Oil Company, a New Jersey corporation.....	26.62%	13.31%	13.31%
Southwestern Development Company, a Colorado corporation....	0.00%	13.31%	13.31%
Columbian Carbon Company, a Delaware corporation.....	2.53%	2.53%	2.53%

Peoples Gas Subsidiary Corporation is an investment company organized under the laws of the State of Illinois. The capital stock of this company is owned by The Peoples Gas Light and Coke Company.

Public Service Company of Northern Illinois is an Illinois corporation engaged in the manufacture, sale and distribution of electric energy and gas to commercial, industrial and domestic consumers in that part of Illinois lying adjacent to and north, south and west of the City of Chicago. A majority of the stock of Public Service Company of Northern Illinois is owned by Commonwealth Edison Company.

Western United Gas and Electric Company is an Illinois corporation engaged in the manufacture, sale and distribution of gas and electric energy to industrial, commercial and domestic consumers in a certain area lying west of the City of Chicago. A majority of the stock of Western United Gas and Electric Company is owned by Commonwealth Subsidiary Corporation.

The Peoples Gas Light and Coke Company is an Illinois corporation engaged in the manufacture, sale and distribution of gas to industrial, commercial and domestic consumers in the City of Chicago. The stock is not closely held nor is it owned or controlled by the same interest or interests that own or control any of the other corporations named in this appendix.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Appellant*,

v.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF APPELLANT.

WILLIAM P. SIDLEY,
J. J. HEDRICK,
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DOUGLAS F. SMITH,
HOWARD NEITZERT,
Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The appellees' brief shows that the purpose of the Commission and the object of the proceedings instituted by the citation directed to the Chicago District Pipeline Company, is, as alleged in appellant's bill, to treat appellant and Chicago District Pipeline Company as one organization, and to prescribe and regulate rates for the combined services of appellant and the District Company as though those services were performed by a single public utility within the

jurisdiction of the Commission. Appellees expressly rely upon the decisions of this Court, announcing and applying the one organization rule as authority for the citation and order complained of by appellant*, and state

> "As these decisions demonstrate conclusively the public character of appellant's business, whether its rates are subject to direct regulation or not, it would appear that the Commission under the Smith and Western Distributing Company cases would be amply justified in giving consideration to the cost of service principle (*i.e.* fair return upon value or cost of property) in determining the reasonableness of Chicago District's operating expenses". (Appellees' brief p. 47)

Appellees further state that the Commission's citation to the District Company requires the same response as the showing required in the one organization cases and that such response will include an analysis of the information demanded of appellant in the order complained of in this case (Appellees' brief p. 2). In other words, the Commission is demanding that appellant prepare and submit the evidence necessary to establish a rate base for gas sold by appellant to the Chicago District Pipeline Company, and by the latter to the distributing companies.

Statements made by appellees that they are "not concerned with what the appellant may or should receive from the sale of its gas" are meaningless, first, because such statements are inconsistent with the one organization rule which the Commission proposes to apply; and, second, because public utilities in general, and the Chicago District Pipeline Company in particular, can not continue to pay more for supplies than the amount which they are permitted to include in their operating expenses. In refusing to accept the contract price as the fair measure of the cost of gas to the Chicago District Pipeline Company and to allow that amount as an element in its operating expense,

*Appellees' brief, pages 2, 34, 46, 50.

and in substituting for that contract price *"a fair return upon value or cost of property"* of Natural Gas Pipeline Company of America, the Commission is *primarily* "concerned with what appellant may and should receive from the sale of its gas".

The Commission is not interested in determining whether the contract between appellant and the Chicago District Pipeline Company is a provident contract. The Commission is not concerned with the circumstances surrounding the negotiation and execution of that contract. The Commission denies the right of appellant to produce evidence on the question of whether or not that contract was a result of arm's length bargaining in the general and open market subject to the usual safeguards of bargaining and competition. The Commission will not permit appellant to prove that the relationship between it and the Chicago District Pipeline Company does not result in common control of the two companies, and did not in any degree or manner influence the actions or policies of either party to the contract, nor any of the terms or provisions thereof. The Commission does not consider as material the fact that the execution of that contract has resulted in great savings to the consumers of gas in the State of Illinois. The Commission does not attach any significance to the fact that the Chicago District Pipeline Company cannot and could not have obtained gas from any other source at rates as low as those stipulated in the supply contract with appellant. The Commission is interested only in fixing a charge for the gas purchased by the Chicago District Pipeline Company which will not allow appellant more than it deems to be a *"fair return upon value or cost of property"* of appellant.

Commission's Order Not Based Upon Common Control.

The only theory under the decisions of this Court, or any other court, upon which the Illinois Commerce Commission would be justified in taking the position it now asserts is the one suggested by the *one organization*

cases*, predicated upon the absence of arm's length bargaining. But neither the order of the Commission nor the citation to the Chicago District Pipeline Company recites the absence of arm's length bargaining. The Commission has never found absence of arm's length bargaining. The Commission has never inquired into that subject. The order of the Commission complained of by appellant is in terms bottomed upon Section 8a of the Illinois Public Utilities Act and was sustained by the court below on that basis. The court below did not find an absence of arm's length bargaining nor any of the facts which this Court has made the basis of the one organization rule, but held Section 8a to authorize the order of the Commission—and such has been the position of the appellees throughout this litigation until they filed their brief with this Court. Now appellees apparently see difficulty in sustaining the validity of Section 8a as they interpret that section and contend "that a common interest existed between the companies"; that the companies "were entered in a common enterprise", and that plaintiff has no competition from wholesalers of natural gas in the Chicago area.** If these supposed facts are necessary to sustain the

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*Smith v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152; *Western Distributing Co.* v. *Public Service Comm'n. of Kansas*, 285 U. S. 119, 124, 126; *Dayton Power & Light Co.* v. *Public Utilities Comm'n.*, 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n. of Ohio*, 292 U. S. 398, 414.

**Reference is made (Appellees' brief, p. 38) to the finding of the three judge court "that plaintiff has no competition from wholesalers of natural gas in the Chicago area". That finding of fact was taken from the Commission's answer filed on the day that the motion for the interlocutory injunction was submitted. Under Equity Rule 31 that statement must be deemed to have been denied; nevertheless the three judge court included it in the finding of facts over objection (R. 102), and this illustrates, we think, one of the vices of the effort of the three judge court to determine this case on the merits without a trial. So far as the matter of competition affected this contract it was the existence or non-existence of competition at the time the contract was negotiated. At that time the appellant had not yet brought gas into Illinois, but it and two other wholly independent pipeline companies were building their pipelines north from the Texas field and were at that juncture as competitive with respect to who should obtain the Illinois business as if they had all been present in Illinois at that time.

Commission's order, or material to any issue before the Court, appellant should be given an opportunity to controvert them by evidence.

Appellant's Offer to Prove Arm's Length Bargaining Bona Fide.

Appellees assert that appellant's offer to prove that there is no common control of appellant and Chicago District Pipeline Company, that the relationship between the two companies did not in any degree or in any manner influence the actions or policies of either party to the contract, or any of the terms and provisions thereof, and that the contract was executed after the most rigid arm's length bargaining in an open and competitive market, is not made in good faith and is ridiculous in view of the fact that this suit has been pending since March 11, 1937. When the application for an interlocutory injunction was argued before the three judge court, appellant pointed to the issues of fact and asked the court to refer the case to a Master to hear the evidence. Counsel for the appellees vigorously resisted this request, contending there, as they do in their brief here,* that there is no question of fact in the case, that the case involves only questions of law, namely, whether Section 8a authorizes the order in question. The court below adopted this view and sustained the order of the Commission as a matter of law without hearing any evidence and without permitting appellant to show the facts.**

In the court below the appellees based their entire case upon their theory of the construction and constitutionality

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*On page 69 of appellees' brief appears the following:

> "We submit that this application of appellant for an injunction can be decided on the legal issues alone and that the District Court properly found for the appellees on those issues".

And on page 80:

> "Since the questions involved in this case are entirely questions of law as we have pointed out, since no useful purpose would be served by a hearing of evidence in this cause * * *".

**See Findings of Fact and Conclusions of Law, R. 90 to 97.

of Section 8a of the Public Utilities Act, but now appellees ask this Court to accept as fact the allegations of their answer, and imply that those allegations have been admitted by the appellant, although the answer was filed on the day the case was argued in the District Court, and Rule 31 for the Courts of Equity of the United States specifically provides that any new or affirmative matter contained in the defendants' answer "shall be deemed to be denied by the plaintiff."

Former Testimony of Appellant's Officers.

Throughout appellees' brief will be found numerous statements that appellant "freely and willingly permitted its officers to testify as to estimates" of appellant's earnings in 1932 when Chicago District Pipeline Company filed its initial rate schedules with the Commission. There is no basis in the record for these statements and their purpose is not clear. Appellant was not a party to those proceedings and, so far as appellant knows, none of its officers testified in the case. The attorney for the Chicago District Pipeline Company appears to have made an independent arrangement with one of the appellant's directors who had represented appellant in negotiations with the Chicago District Pipeline Company, resulting in the execution of the supply contract, to present to the Commission some of the estimates that had been prepared by him in connection with such negotiations. It also appears that the same attorney made an independent arrangement with one of appellant's engineers to give some testimony as to oil leases held by an affiliate of appellant; but these arrangements were not made with the appellant company and neither of these witnesses in any sense represented appellant, and appellant assumed no responsibility for their testimony. If any of the officers of appellant testified in these or any other proceedings before the Commission appellant has no knowledge of that fact.

Compliance With Order Not Necessary to Control of Intrastate Rates.

Appellees' contention that the position taken by appellant, if sustained, would prevent the Commission from regulating the cost of gas to consumers in the State of Illinois, is merely an assertion that appellant's position, if sustained, would prevent the Commission from regulating a sale in interstate commerce made in good faith, at arm's length, and in an open competitive market. The gas actually delivered by the distributing companies to the consumers in the Chicago metropolitan area is a mixture of about 50 per cent artificial gas and 50 per cent natural gas purchased from appellant. The Commission granted the Chicago District Pipeline Company a certificate of public convenience and necessity which enabled it to supply the distributing companies with gas purchased under its fifteen-year contract with appellant. That contract has resulted in great savings to consumers in Illinois (R. 72) and the Commission would have been guilty of a gross breach of its duty to the public if it had refused to permit the arrangement which has produced that great saving. Having found that that contract was provident, and having permitted and authorized the District Company to become a party thereto, unless and until it is established that the facts of the case warrant the application of the one organization rule the Commission has no right to review, regulate or pass judgment upon the reasonableness of the profits of the appellant under that contract. This Court has held that that function is one reserved to the Congress of the United States.*

Appellant's Damage.

Appellees' assertions that the damage which would result to appellant from enforcement of the order of the Commission is nominal, is false and unsupported by the record.

**Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308. See also appellant's brief, pages 38 and 39.

The Commission proposes to require appellant to establish a rate base from which to compute a "fair return upon value or cost of property" for appellant's services. This Court knows what great expense is involved in the establishment of a rate base, particularly of an industry such as appellant's.* The court below found that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000 and the appellees took no exception to that finding. Appellant alleges in its complaint (R. 8), supports that allegation by affidavit (R. 76), and is prepared to prove beyond question or doubt, that the actual cost of compliance with the requirements of the Commission will be many times $3,000; that compliance with the order will result in the disclosure of appellant's business affairs and trade secrets, to its irreparable harm and injury, and that appellant's credit will be impaired, to its great and irreparable loss.

THE ORDER OF THE ILLINOIS COMMERCE COMMISSION IS NOT AUTHORIZED BY SECTION 8a OF THE ILLINOIS PUBLIC UTILITIES ACT.

The Commission has cited no case supporting its construction of Section 8a, and has wholly failed to distinguish *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, which involved almost the exact problem of construction involved in the present case.

The appellees' discussion of this point suggests reasons, other than those discussed in appellant's brief, why the powers of inquiry and investigation granted by paragraph 2 of Section 8a are to be exercised only in aid of the performance of the duty provided in paragraph 3, namely, to approve and disapprove contracts with affiliates, hereafter made.

**Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133; *Western Distributing Co.* v. *Public Service Comm'n. of Kansas,* 285 U. S. 119; *Dayton Power & Light Co.* v. *Public Utilities Comm'n.,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n. of Ohio,* 292 U. S. 398.

House Bill No. 485.

Section 8a was added to the Illinois Public Utilities Act by House Bill 485, approved July 8, 1933. This Act is entitled "An Act to Amend Section 8 of Article I; Sections 27 and 30 of Article III; Sections 32, 36, 38 and 39 of Article IV; and to add Section 8a to Article I; Section 27a to Article III; Section 41a to Article IV; and Section 68a to Article V of 'An Act Concerning Public Utilities' approved June 29, 1931, as amended".* In making these extensive changes in the many provisions of the Illinois Public Utility Act the power to obtain facts from "affiliated interests" and the duty to pass upon contracts with such interests were embraced in a single section. The fair construction of this, we believe, is that the legislature granted the power stated in paragraph 2 as an aid to the discharge of the duty imposed by paragraph 3, and did not, as the Commission contends, mean that the two were to be wholly unrelated. If the grant of power in paragraph 2 was intended to be used by the Commission in connection with its rate-making duties as the Commission argues, it would have been placed in Article V entitled "Proceedings Before the Commission and in the Courts" which provides for investigation and hearings and the issuance of subpoenas by the Commission, and grants the Commission power to inspect the records, books and accounts, and examine the agents, officers and employees of utilities.**

Section 9 of the Public Utilities Act*** requires public utilities to furnish the Commission with all information *"required by it to carry into effect the provisions of this Act"*. Section 60**** authorizes the Commission to hold hearings and issue subpoenas *"concerning any matter covered by the provisions of this Act."* Section 63***** gives

*Session Laws of Illinois, 1933, page 841.
**See Appendix B, appellant's brief, pages 70 to 74.
***Chap. 111-2/3 Ill. Rev. Stat. 1937, Sec. 9.
****Appendix B, appellant's brief, page 70.
*****Appendix B, appellant's brief, page 73.

the Commission power to inspect the books and examine the officers and employees of public utilities *"in relation to any matter within the jurisdiction of the Commission"*. By these sections the Commission is vested with general powers of inquiry and investigation to enable it to perform the duties imposed upon it by other sections of the Act. If it had been the intention of the Illinois legislature to enlarge these general powers of inquiry and investigation by the provisions of paragraph 2 of Section 8a, it seems probable that paragraph 2 would have been made a separate section of the Act like the sections mentioned above, and would have contained some such language as that quoted from those sections, indicating that intention. Paragraph 2 of Section 8a contains no such language, and, in the words of this court found in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 420, the grant of power in paragraph 2 followed by the imposition of a duty *"in the section (paragraph) next following, with hardly a word between, hang together and show the purposes for which it was intended that"* the power should be exercised.

Statutes of Other States.

Appellees name some sixteen States that have enacted laws similar in some respect to Section 8a of the Illinois Public Utilities Act (Appellees' Brief p. 31). The statutes of eight of these States purport to empower the State Commission involved to investigate accounts and records of transactions wth affiliates.* Four of these eight statutes make this grant of power general in terms. In each of these statutes the grant is made in a section involving the imposition of no new duty upon the Commission, and three of the four statutes expressly state that the power may be exercised in the performance of all the duties of the Com-

*See Note 4, page 32, appellees' brief.

mission.* Two such statutes had been approved when Section 8a was added to the Illinois Public Utilities Act.** However, instead of following the form and terms of these Acts, the Illinois legislature adopted almost verbatim the New York statute which was then the only act of its kind on the State statute books, and which linked the power of investigation and inquiry with the imposition of a new duty, and eliminated the provision that such power might be exercised in the *general performance* of the duties of the Commission.

If the Illinois Legislature had intended to grant to the Commission general powers of investigation and inquiry, it is reasonable to suppose that it would have followed the broader form of statute which had been adopted by the States of Alabama and Massachusetts. Those statutes were similar in form and content to the general grants of power of investigation and inquiry contained in Sections 9, 60 and 63 of the Illinois Public Utilities Act referred to above. The action of the legislature is indicative of an intention to limit the scope of the power granted.

Purpose of Section 8a.

Prior to the enactment of Section 8a this court had held that the Illinois Commerce Commission had inherent power to require a local utility to establish the reasonableness of any amount paid for supplies if the buyer and seller company were subject to common control.*** But this power was not available to the State to control such transactions *ab initio*. It is for this reason no doubt that Section 8a was limited in its application to contracts thereafter made, and provides that such contracts are void unless approved. The constitutionality of Section 8a so construed is not here involved.

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*Alabama Laws, 1932, No. 232, Sec. 10; Arkansas Acts, 1935, No. 324, Sec. 28; Massachusetts General Laws, 1932, Vol. 2, Ch. 164, Sec. 85; and New Jersey Public Laws, 1935, Ch. 53, Secs. 1 and 3.

**See Alabama and Massachussets statutes referred to above.

***Smith v. *Illinois Bell Telephone Company*, 282 U. S. 133, 152.

THE PROVISIONS OF SECTION 8a OF THE ILLINOIS PUBLIC UTILITIES ACT, AS CONSTRUED AND RELIED UPON BY THE COMMISSION TO SUSTAIN ITS ORDER, ARE IN CONFLICT WITH THE FOURTEENTH AMENDMENT.

Similar Statutes in Other States.

It is apparently appellees' position that the fact that sixteen states, besides Illinois, have adopted statutes containing some of the features of Section 8a of the Illinois Public Utilities Act, is persuasive of its reasonableness. It is significant, however, that only nine states have empowered their respective commissions to investigate accounts and records of transactions with affiliates.* One of these nine states has permitted such investigation only when the Commission finds as a matter of fact that there is "substantial" common control or the "absence of equal bargaining power";** and one of the remaining eight states will permit such investigation only when a contract is submitted to the Commission for its approval.***

Appellees' argument then comes to this,—that only seven of the forty-eight states have deemed it proper to authorize their rate regulatory bodies to investigate accounts and records of transactions with affiliates related by common directors or some degree of common stock ownership. Three of these states, including Illinois, have merely adopted the New York statute; and the fact that there was no independent thought or research devoted to the subject by the legislatures of at least some of these states is indicated by the record in Illinois. Neither the Committee of the Illinois Senate nor of the House of Representatives to which Section 8a was referred for consideration made any report on the statute, and virtually no evidence was heard

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*See note 4, page 32, Appellees' brief.

**Massachusetts General Laws 1932, Vol. 2, C. 164, Sec. 85.

***Oregon Code Ann. Supp. 1935, Sec. 61-272.

by either of these Committees with respect to its meaning, purpose or effect.

Section 8a and the Detection of "Unfair Advantage."

Appellees' second argument in support of the statute seems to be that it is reasonable that the Commission should be permitted to investigate contracts between public utilities and affiliates, as that term is defined in the statute, to determine whether "an unfair advantage has been taken of the local utility". Appellees state "that Section 8a of the Public Utilities Act is properly construed as delegating to the Commission the duty of determining whether or not an affiliate, as that term is defined in the statute, has taken an unfair advantage of its related local public utility company". (Appellees' brief p. 40.) *The Commission is not, in fact, so construing Section 8a.* The Commission is not attempting to determine whether an unfair advantage has been taken of the Chicago District Pipeline Company, but is attempting to establish a rate base upon which to predicate rates for the appellant's service.

Contracts Between Corporations With Interlocking Directorates.

Appellees suggest that those cases, holding that contracts between corporations having interlocking directorates will be closely scrutinized, demonstrate the reasonableness of Section 8a; but neither this Court nor any other court, as far as we have been able to ascertain, has ever held that a contract, which is fairly and honestly made after arm's length bargaining and without fraud and collusion, may be avoided and disregarded merely because the two corporations involved had one director in common, or because ten per cent of the stock of the two corporations was held by the same person or persons. The most that the cases hold is that contracts between corporations with interlocking directorates will be closely scrutinized for evi-

dences of fraud and collusion. In the instant case appellant has offered to prove that the supply contract in question was executed without fraud and collusion and in the open market subject to the usual safeguards of bargaining and competition, but the Commission and the court below refused to hear such evidence, holding that as a matter of law Section 8a authorizes the Commission entirely to disregard appellant's contract with Chicago District Pipeline Company in fixing the rates for natural gas to the distributing companies.

The One Organization Cases.

The cases applying the one organization rule are in no sense authority for the reasonableness of Section 8a as interpreted by the Commission, for in all such cases this Court has found as a matter of fact, after investigation and hearing, (which has thus far been denied in this case) that the utility and the affiliated corporation were controlled by the same interest and that there was an absence of arm's length bargaining and all the elements which go to make market value in the negotiation and execution of the supply contract involved.

The decisions of this Court involving the rates of interstate pipeline companies may be divided into two categories —(1) those in which the interstate company and the local distributor were controlled by a single interest, and where the supply contract was not the result of arm's length bargaining in the open market, but was arbitrarily imposed upon the distributor by those in control of the two corporations;* and (2) those in which the interstate supply company and the local distributor were controlled by independent interests and the supply contract was the result of

Western Distributing Co. v. *Public Service Comm'n of Kansas,* 285 U. S. 119, 124, 126; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n of Ohio,* 292 U. S. 398, 414. (See also, *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 152, which is one of the so-called "One organization cases").

arm's length bargaining.* In cases falling into the first category, the local commission has been permitted to treat the two corporate entities as one organization and to establish a rate base and prescribe rates for the entire enterprise. In cases falling into the second category, this Court has uniformly held that the State Commission has no jurisdiction over the rates of the interstate company and that the price provided by the supply contract is a proper measure of operating expense for the local distributor. Section 8a, as construed by the Commission in its order here complained of, would arbitrarily reclassify the cases on the basis of ten per cent stock ownership or one or more directors in common. The appellees have nowhere in their brief suggested any justification for, or cited any case in support of, this arbitrary classification.

The Wichita Gas Company Case.

While the opinion of this Court in *State Corporation Commission of Kansas* v. *Wichita Gas Company,* 290 U. S. 561, in no sense supports the constitutionality of Section 8a of the Public Utilities Act, the appellees place so much reliance upon the decision that it seems advisable to call the Court's attention to the following features of that case which distinguish it from the one at bar:

1. In the *Wichita Gas Company case* this Court found as a matter of fact that the distributing companies were controlled by Henry L. Dougherty, who also controlled the supply company and Henry L. Dougherty & Company (p. 563). There has been no finding of common control of appellant and the Chicago District Pipeline Company and none in fact exists.

2. This Court did not find it necessary to pass upon the question of whether the single enterprise rule was applicable to the facts involved in the *Wichita Gas Company case,* but decided the case on other grounds (p. 568).

*See the cases cited on page 38 of Appellant's brief.

3. The order complained of in the *Wichita Gas Company case was directed to the local distributors within the jurisdiction of the Commission* (p. 566); the interstate supply company was not a party to the proceedings before the Commission and no order of any character was directed against it.

4. The order involved in that case imposed no burden either upon the local utilities or upon the interstate supply company and was nothing more than a finding of fact that certain payments should not be set up as expense items by the local distributing companies (p. 566). The order in the present case is more than a finding of fact—it is an exercise of jurisdiction. It directs the appellant immediately to produce the evidence necessary to establish a rate base, to its irreparable injury and damage.

Cases Cited by Appellant.

The appellees have been unsuccessful in their attempt to distinguish the cases cited by appellant (p. 39 of appellees' brief). The Commission contends that in the cases cited the damage followed immediately upon the determination of the fact made the basis of the presumption, but that in this case the damage only can follow further hearing and determination of other facts by the Commission. But the damage follows immediately here too if the statute authorizes the Commission's order on appellant to produce the evidence necessary to determine a rate base.

The presumption of common control raised by Section 8a is no less immediate and vicious than the presumptions held invalid in *Schlesinger* v. *Wisconsin,* 270 U. S. 230 and the other cases cited on pages 33 to 36, inclusive, of appellant's brief. Section 8a, as interpreted by the Commission conclusively presumes absence of arm's length bargaining and common control, if there is ten per cent common stock ownership or a common director. Acting on this interpretation, the Commission applies the statute to appellant by an

order which would require it immediately to make the showing necessary to establish a rate base for the commodity sold in interstate commerce. The making of such a showing entails immediate and irreparable damage to appellant.

On the issue as to whether this statute is arbitrary, we respectfully submit that one or the other of two conclusions is inescapable. The fact as to whether an intercorporate relationship within the terms of Section 8a has had any effect upon the supply contract has not been judicially determined. Either appellant is foreclosed from showing the facts by conclusive presumption of the statute, and the statute is therefore fatally arbitrary,—or the facts are still determinative and being determinative, should be developed.

THE ORDER OF THE ILLINOIS COMMERCE COMMISSION, AS APPLIED TO THIS APPELLANT, IS IN CONTRAVENTION OF THE COMMERCE CLAUSE.

The One Organization Cases.

Appellees cite *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119; *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290; and *Columbus Gas & Fuel Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 398, as authority for their contention that the order of the Commission does not contravene the commerce clause. In each of these cases the supply company and the local utility were wholly owned, directly or indirectly, by the same corporate entity, and the court found in each case as a matter of fact that they were subject to common control; also in each of these cases the order to establish a rate base for the affiliated company was directed to the local utility within the jurisdiction of the Commission and *not to the interstate supply company.*

Appellees apparently attempt to avoid these objections by urging (1) that this case cannot be distinguished from

the one organization cases "on the ground that here the distributing group holds only a twenty-seven per cent stock interest in the pipeline company as compared with the total stock ownership in the" one organization cases, "since, as it has been alleged in the answer, there was a community of interest between the gas producing and distributing groups"; (2) that the Commission has no other means of obtaining the information which it requires.

Neither of these propositions, if true, would make the order of the Commission any less a burden upon interstate commerce. But, neither is true. With respect to the first proposition the fact that the Commission has alleged "community of interest" in its answer does not establish "community of interest" as a fact. Appellees asserted in the court below and the court in effect so found that the factual question of common control is not involved in the case. If, however, the appellees and the court below were in error on this point, appellant should be given an opportunity to show the facts.

With respect to the second proposition we respectfully call the court's attention to its holding in *Heiner* v. *Donnan*, 285 U. S. 312, 318, that one may not be stripped of his constitutional rights in order to serve the convenience of the State. However, it is perfectly apparent that the difficulty suggested by the Commission is entirely imaginary. The local utilities had no difficulty in making the showing required in the one organization cases which have come before this court. Obviously, *if there is common control in fact,* the local utility can always be compelled to produce the information, records and data to which the Commission is entitled, for the local utility and the supply company are, under such circumstances, "in practical effect one organization."

The Illinois Commerce Commission is given broad powers to issue subpoenas and subpoenas duces tecum and to compel the attendance of witnesses and the production of docu-

ments.* The Commission is unwilling to resort to this procedure in the instant case because it is well aware that any testimony or documents which it might require of appellant would be held irrelevant and immaterial to any investigation properly within its jurisdiction.

Other Cases Cited by Appellees.

The cases cited by appellees on pages 58 to 64 of their brief are clearly distinguishable from the case at bar. In each of the cases cited, the burden on interstate commerce was indirect and incidental to the regulation of the *intrastate* business of the person or corporation involved. The regulation of such intrastate business was within the power of the State. This court has held on many occasions that a State is not precluded from any reasonable exercise of its police power merely because interstate commerce may be indirectly and incidentally affected. However, in the instant case the appellant is not engaged in intrastate commerce subject to the jurisdiction of the State and the Commission is not engaged in the exercise of any power vested in the State. The Commission is not attempting to regulate the rates of the Chicago District Pipeline Company, but the rates which appellant may charge for its gas. The Commission is attempting to apply the one organization rule to a situation where, under the decisions of this court, the rule is clearly not applicable. Under such circumstances, any burden on interstate commerce, no matter how slight, is unlawful and will be restrained.

Appellant's Cases.

The Commission has not distinguished the cases relied upon by the appellant. The line of cases headed by *International Text Book Co.* v. *Pigg*, 217 U. S. 91, are indistinguishable from the situation here involved. If the order of the Illinois Commission is not complied with, appellant must

*See Appendix B, Appellant's brief, pages 70 to 74.

withdraw from the State of Illinois or suffer the penalties provided by the Public Utilities Act for non-obedience of the orders of the Illinois Commerce Commission. Likewise, if International Text Book Company had refused to comply with the regulations of the State of Kansas it would have been required to withdraw from the State or suffer the penalties provided for non-compliance.

The order of the Missouri Commission involved in *State, ex rel., Cities Service Gas Company* v. *Public Service Commission*, 337 Mo. 809, 85 S. W. (2) 890, was no more a regulation of or burden upon interstate commerce than the order complained of in this case. The scope and effect of the two orders was the same except that the order of the Illinois Commerce Commission is many times more burdensome.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

JAMES M. SLATTERY, ANDREW OLSON AND CHARLES E. BYRNE, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS.

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HARRY R. BOOTH,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA, A CORPORATION,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE AND HARRY A. BARR, THE PERSONS CONSTITUTING THE ILLINOIS COMMERCE COMMISSION OF THE STATE OF ILLINOIS, AND OTTO KERNER, ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

This statement is filed on behalf of the appellees herein by the Attorney General of the State of Illinois, attorney for said appellees, pursuant to paragraph 3 of Rule 12 of this Court in answer to the statement filed on behalf of Natural Gas Pipeline Company of America, appellant herein, a copy of which was served on the Attorney General of the State of Illinois on July 14, A. D. 1937.

The statement filed by appellants as required by paragraph 1 of Rule 12 of this Court is incomplete and misleading in that it fails to state that the order of the Illinois Commerce Commission entered March 3, 1937, which appellant seeks to have enjoined in this proceeding, was entered by the said Illinois Commerce Commission in a proceeding now pending before it in which an investigation

is being made as to the reasonableness of the rates of Chicago District Pipeline Company, an Illinois corporation, carrying on the business of selling natural gas to distributing companies as a public utility in the State of Illinois, and subject to the jurisdiction of the Illinois Commerce Commission.

The statement of appellants in quoting from "An Act Concerning Public Utilities," approved June 29, 1921, and in force July 1, 1921, as amended (Chapter 111a Illinois Revised Statutes, 1935, Section 23(1)) as the basis for the Commission's order now complained of, omitted a portion of said statute which is relevant and material to the instant case. That sub-section is as follows:

> "(f) Every corporation which has one or more elective officers, or one or more directors, in common with such public utility;"

We submit that the statement filed by counsel for the appellant did not comply with the provisions of paragraph 1 of Rule 12 of this Court in that it fails to disclose any basis for the conclusion contained in that statement that the District Court abused its discretion in entering the order of July 2nd, A. D. 1937. On the contrary, that court properly exercised its discretion in denying the application of appellant for an interlocutory injunction as is shown by the "Findings of Fact and Conclusions of Law" made by the District Court, since neither the statute nor the order of the Illinois Commerce Commission complained of contravene the provisions of Article I, Section 8, paragraph 3 or the "Due Process" clause of the Constitution of the United States or any provision of the Constitution of the State of Illinois. *Western Distributing Co.* v. *Public Service Commission of Kansas* (1932), 285 U. S. 119, 76 L. Ed. 655; *Smith* v. *Illinois Bell Telephone Company* (1930), 282 U. S. 133, 75 L. Ed. 255; *Geddes et al.* v. *Ana-*

conda Copper Mining Company (1921), 254 U. S. 590; *Interstate Commerce Commission* v. *Goodrich Transit Company* (1912), 224 U. S. 194, 211, 216; *People ex rel. Stead* v. *Chicago, I. & L. Ry. Co.* (1906), 223 Ill. 581, 591-4; *State of Kansas ex rel. Public Utilities Comm.* v. *A. T. & S. F. Ry. Co.* (1924), 116 Kan. 151, 225 Pac. 1026; *State of Kansas ex rel. Public Utilities Comm.* v. *A. T. & S. F. Ry. Co.* (1924), 115 Kan. 3; *Texas & P. Ry.* v. *Railroad Comm. of Texas* (1912), 105 Tex. 386, 150 S. W. 878.

We submit further that the District Court did not abuse its discretion in entering the order of July 2nd, A. D. 1937, without first holding a hearing on the merits since the Court granted the fullest possible opportunity to the parties to this cause to argue the question as to whether an interlocutory injunction should be granted and permitted the parties to file memoranda in support of their respective positions. Moreover, a hearing on the merits is, we submit, entirely unnecessary since only questions of law are involved in this case, and they may be fully passed on and determined on the application for an interlocutory injunction.

Wherefore the appellees pray that the appeal be dismissed with costs to appellees.

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Attorney for Appellees.

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OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE, HARRY A. BARR and OTTO KERNER, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
a corporation,

VS.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

CORRECTION OF APPELLANT'S STATEMENT OF THE CASE.

(Appellant's Brief, pp. 1-18.)

MAY IT PLEASE THE COURT:

Appellant in its brief at pages 1 to 18 sets out what is titled as "Statement of the Case" but the various subdivisions from pages 3 to 18, inclusive, consist almost entirely of argument. Although we believe that all of appellant's contentions are fully and completely met by our argument (pp. 21-78) in this brief, we shall

answer briefly here some of the arguments contained in appellant's "Statement of the Case."

Appellant has set out correctly at pages 1 and 2 of the brief the material facts involved in this proceeding with the exception of the allegation that appellant's business is "national in character." This was denied in appellee's answer. (R. 56.) Moreover it is not true, as appellant has stated, that Chicago District Pipeline Company has made full response to the citation issued against it by the Illinois Commerce Commission, hereinafter called "the Commission." The facts are correctly set up in appellant's bill where it is alleged (R. 3) that "Chicago District Pipeline Company had closed its evidence, completed its proof and rested its case." In order to make "full response" to the citation Chicago District Pipeline Company would, under the decisions of this court hereinafter referred to,[1] be required to show that its payments to appellant are not unreasonable. Chicago District Pipeline Company has failed to present such evidence although the Commission sought to obtain the information, now requested from appellant, from one of the directors common to the two companies, who testified before the Commission. Moreover, "full response" to the citation will include an answer, if any there might be, to the evidence which will be introduced on behalf of the Commission which will include an analysis of the information requested of appellant. Introduction of this evidence has been delayed by the pendency of this injunction suit.

At page 4 of its brief appellant has set out its two primary contentions, and we submit that those are the fundamental issues involved in this case, namely,

[1] Page 34, this brief.

whether or not Section 8a of the Illinois Public Utilities Act authorizes the order entered by the Commission on March 3, 1937, and whether if so construed the statute and the order contravene any portions of the Constitution of the United States.

Both in the section headed "Summary Statement of Issues" and that headed "Analysis of Section 8a of the Public Utilities Act" appellant has made a number of erroneous statements. For example, appellant states at page 3 of the brief that "the statute, as construed by the Commission, gives it jurisdiction over 'affiliated interests' to require them to give the Commission access to their books and records, and to prepare and submit such statistical data and reports as the Commission may direct." Section 8a of the Illinois Public Utilities Act specifically and definitely delegates to the Commission only the power to require reports of affiliated interests with respect to transactions between affiliated interests other than ownership of stock and receipt of dividends.

Again, at the same page, appellant charges that the Commission has stated that its purpose in ordering appellant to prepare and present certain reports is "for the stated purpose of enabling the Commission to pass judgment upon the reasonableness of the earnings received by appellant under its contract with the Chicago District Company, on the theory that 10 per cent common stock interest is the equivalent of common control of or the absence of arm's length bargaining between two corporations, regardless of what the actual facts may be." The order of the Commission complained of here and the sworn answer of these appellees state specifically that the purpose of the Commission in requiring the reports of appellant is to

permit the Commission to determine the proper allowance to be made as an operating expense of Chicago District Pipeline Company for the purchase of natural gas from appellant. Moreover, as will be shown more fully hereafter, the Commission, having found that appellant came within the class of persons and corporations defined as "affiliated interests" in Section 8a, complied with the statutory duty imposed upon the Commission by said section.

At page 4 of the brief appellant states that it "asserts as a fact, alleges in its complaint (R. 4, 5), and is ready at the first opportunity to prove that the relationship between it and the Chicago District Company does not result in common control of the two companies, and did not, in any degree, or in any manner influence the actions or policies of either party to the contract or any of the terms or provisions thereof, that, on the contrary the contract was executed after the most rigid arm's length bargaining in an open competitive market." In the first place, appellant, neither at the places in the record referred to nor at any other place in its bill made such an allegation. The only thing which the District Court had before it and which this court has on this question is the allegation of the appellees in their sworn answer (R. 57) that

> "on July 25, 1931, when the contract between the plaintiff, then known as Continental Construction Corporation, and the Chicago District Pipeline Company was entered into, a copy of which contract is set forth as Exhibit A to plaintiff's bill of complaint, and prior thereto during the negotiations leading to the construction of said pipeline project and the execution of said contract, there was a common interest in said pipeline project between Chicago District Pipeline Company and the dis-

tributing companies, namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company on the one hand, and plaintiff and persons or corporations owning or controlling stock or other securities of the said plaintiff and gas acreage used to supply gas by said plaintiff, on the other, by reason of stock holding (fol. 26) interlocking directorates and business understandings between said corporations and persons controlling or representing said corporation. Allege that no pipeline company other than plaintiff operates in or near the territory served by said Chicago District Pipeline Company. Allege that the agreement of forbearance executed by and between plaintiff and said Chicago District Pipeline Company on or about December 31, 1935, furnishes no safeguard or guaranty of the reasonableness of the price of gas sold to said Chicago District Pipeline Company by said plaintiff so as to warrant the use of said price as a test of the reasonableness of the operating expenses of said Chicago District Pipeline Company."

The District Court correctly found (R. 95) that "no pipeline company other than plaintiff operates in or near the territory served by Chicago District Pipeline Company and that plaintiff has no competition from other wholesalers of natural gas in the Chicago area." Appellant's claim that it is ready to prove at the first opportunity its lack of common control with Chicago District Pipeline Company is ridiculous in view of the fact that this suit has been pending in the District Court of the United States for the Northern District of Illinois since March 11, 1937. The answer of the appellees denying all of the material allegations in appellant's bill and alleging certain new matter, which, if true, would defeat the right of appellants to an injunction, has been on file since April 7, 1937. Although the order of the District Court under review here is dated

July 2, 1937, that court had indicated at least a month before that time that the application of appellant for an interlocutory injunction would be denied. Despite the fact that the case has been at issue now for approximately seven months and the interlocutory injunction was denied five months ago, appellant has not yet made any effort to have this matter set for hearing on the merits.

Appellant's "Analysis of Section 8a of the Public Utilities Act" (appellant's brief, page 5) contains an argument which we believe is fully answered at pages 21 to 27 of this brief. However, it might be pointed out that the argument which appellant seeks to make based on a construction of paragraph 2 of Section 8a as limited by paragraph 3 thereof, is one which was not made either to the District Court or to Mr. Justice Roberts when appellant's application for a stay order was heard by him.

In the section titled, "The Order of the Commission Assailed in this Cause" (brief, p. 8), appellant again makes the erroneous statement that the Commission in its order proceeded on the conclusive presumption that the existence of a 10 per cent common stock interest or a common director or elective officer is the equivalent of a finding of fact after an investigation and hearing that substantial influence has actually been exercised over the policies and actions of the public utility. We shall demonstrate the proper construction to be placed on Section 8a.

The appellant charges at page 9 of its brief that the Commission proposes, in fixing rates of Chicago District Pipeline Company, to completely disregard the

contract price at which appellant sells gas to the Chicago District Pipeline Company. We submit that it is entirely clear from the citation issued against Chicago District Pipeline Company, the order complained of here and the answer of these appellees filed in the District Court, that what the Commission proposes to do is to determine what a reasonable allowance for operating expenses of the Chicago District Pipeline Company for its purchases from appellant may be, considering all of the material evidence which may be before the Commission on the subject.

Appellant again, at page 9 of its brief, charges that the Commission intends to determine from the data which appellant is required to produce and from its records required to be made available, what the appellant should be permitted to receive from the sale of gas in interstate commerce. As will be more fully set out hereinafter[1] the Commission is not concerned with what appellant either may or should receive from the sale of its gas to Chicago District Pipeline Company. The only concern of the Commission is as to the proper allowance to be made for this item as an operating expense in fixing the rates of Chicago District Pipeline Company. The very language of the order of the Commission and the answer of the appellees, quoted by appellant in its brief at page 10, demonstrates this conclusively.

In connection with appellant's discussion, at pages 11 and 12 of its brief, of prior action of the Commission with respect to the rates of Chicago District Pipeline Company, none of which appears in this record, we feel impelled to advise this court more fully as to the actual facts of that situation.

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[1] Page 24, this brief.

When, in 1933, the Commission entered an order refusing to approve the contracts between Chicago District Pipeline Company and the local distributing companies and ordered said company to fix substantially lower rates, the company filed a bill in the District Court for the Northern District of Illinois, Eastern Division, praying for an injunction to restrain the Commission from enforcing said rate order. A temporary restraining order and an interlocutory injunction were issued and the matter referred to Henry P. Chandler of the Chicago Bar, as a Special Master, for the purpose of conducting hearings on the issues involved in this cause. All of the testimony introduced before the Commission and additional evidence was put in the record before the Special Master and the case closed. No additional evidence as to earnings of appellant was introduced before the Master. Mr. Chandler then submitted to the parties a tentative report which has been referred to by appellant in its memorandum of authorities filed in the court below. The Special Master came to the conclusion that a permanent injunction should issue but found against the complainant on the principal issue in the case, namely, whether the Commission had the power in determining a proper rate for Chicago District Pipeline Company to consider the value of the property of this appellant and its estimated expenses in producing and transporting the gas sold to Chicago District Pipeline Company. The Special Master, having concluded that the Commission was justified in making a determination similar to the one made by this court in *Dayton Power & Light Company* v. *Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267, proceeded to make that determination and since he came to the

conclusion that the Commission had been in error in its finding as to the life of the gas fields supplying the gas it was necessarily in error in determining the proper allowance to be made for the depletion reserve.

After receipt of this tentative report the parties began lengthy negotiations which were terminated December 31, 1935, when the Commission entered an order allowing Chicago District Pipeline Company to file its present schedule of rates which differed from the rates fixed by the Commission's order of June 16, 1933, (which was complained of in the District Court in the proceeding just referred to) by an amount calculated to correct the error found by the Special Master to have been made in the allowance for depletion in the Commission's previous order.

On the same date appellant and Chicago District Pipeline Company entered into an agreement of forbearance (R. 36) which was calculated to reduce the price of gas to Chicago District Pipeline Company by an amount sufficient to permit it to sell gas to the local distributing companies at the rates filed with the Commission.

In the order of December 31, 1935, allowing Chicago District Pipeline Company to file the present schedule of rates the Commission specifically stated (R. 45):

> "that the consent herein should be granted with the express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipeline Company;"

As was pointed out in the order complained of here two of the officers of appellant appeared before the Commission, when it was first considering the reasonableness

of the rates of Chicago District Pipeline Company in 1932, and one testified as to the estimate of the earnings and expenses of appellant and the other as to the actual experience of appellant for the first few months it had carried on the business. The court can well understand that with Chicago District Pipeline Company already supplying natural gas to the local distributing companies and they in turn a mixture of artificial and natural gas to their customers, it was imperative that after approximately four years of litigation the Commission take some action which would fix, if only temporarily, the rates for this gas. The point which appellant attempts to make—that a citation was issued by the Commission against Chicago District Pipeline Company only eleven months after the order allowing the filing of the present schedule of rates—is meaningless in the face of these facts.

We submit that the statement made by appellant in its brief, at page 12, that the Commission has no jurisdiction to increase appellant's interstate rates, shows as clearly as anything might, the fallacy in appellant's claim that the Commission seeks to regulate its interstate business.

The argument which appellant makes beginning at page 12 of its brief titled, "Injury to Appellant Resulting from Compliance with the Order" was made in the lower court and was apparently not convincing. Most of the allegations contained in this section appear in the affidavit of one C. E. Holmes in support of appellant's application for an interlocutory injunction and in part, at least, have no connection with any portion of appellant's bill. We should like to call the court's attention at this point to two things which we feel it is important to consider in connection with the claims of appellant as to

the "great and irreparable" damage which compliance with the Commission's order would bring about.

In the first place, appellant appears before this court pleading that it be allowed to violate a fundamental maxim of equity, namely, that "he who seeks equity must do equity." The Chicago District Pipeline Company procured the Commission to allow it to fix and file certain rates largely—as is pointed out in the order complained of here—on the basis of testimony by officers of appellant as to its earnings. (R. 48.) Appellant now having had three full years of operating experience, the Commission, as it says, finds it imperative that they be advised as to the actual operating experience of appellant in order that they might determine, after comparing the actual experience with the estimates, whether or not the allowance made as an operating cost to Chicago District Pipeline Company for the purchase of gas from appellant, was reasonable. (R. 48, 51.) Appellant, who then so freely and so willingly permitted its officers to testify as to *estimates* when its affiliate, Chicago District Pipeline Company, was seeking permission and approval of this arrangement, now claims that its constitutional rights will be infringed if it is required to disclose its actual *experience*.

Moreover, if appellant's claims as to damages and injury which it will suffer if it is forced to comply with the Commission's order are examined, it is immediately apparent that aside from the very nominal cost—nominal both actually and relatively—of supplying the information requested by the Commission, the injuries which appellant claims to fear are at most injuries to future profits.[1]

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[1] See page 75, this brief.

Beginning at page 15 of its brief appellant attempts to show that the action of the Commission here complained of is unnecessary to the proper regulation of intrastate gas rates.

We have already referred to appellees' allegation in the answer as to the community of interest which existed between the stockholders of appellant, including the local distributing companies in Chicago (the principal one of which is The Peoples Gas Light & Coke Co.) at the time the project of transporting natural gas from Texas to Illinois was begun.[1]

It is not true, as is shown by a quotation from a previous Commission order at page 16 of appellant's brief, that the Commission ever approved the price at which gas is currently sold by appellant to the Chicago District Company. All that the Commission did find was that the price at which the natural gas was to be sold was lower than the cost to the local distributing companies of manufactured gas, and the savings which appellant refers to as having accrued to the consumers by virtue of the use of a mixture of natural and manufactured gas, instead of manufactured gas, are due entirely to that differential and to the action of the Commission which has been heretofore referred to[2] in requiring Chicago District Company to reduce its rates to the local distributing companies in its order of December 31, 1935, hereinbefore referred to.

By quoting from a previous order of the Commission on page 16 of appellant's brief, the appellant argues in effect, that the Commission has approved not only the price at which gas is currently sold by appellant to

[1] Page 4, this brief.
[2] Page 9, this brief.

the Chicago District Company, but has also approved, for the life of the contract between appellant and Chicago District Company, the contract price as the sole measure of the reasonableness of Chicago District's operating expenses. While the contract was placed in evidence before the Commission in the original Chicago District rate case, neither the company nor the Commission ever took the position that the Commission had power to approve or disapprove that arrangement. Merely because the Commission permitted Chicago District to file a schedule of rates for the sale of natural gas to Peoples Gas and other distributing companies, did not mean that the Commission had approved either then, or for the life of the contract, the contract price as the proper measure of the operating expenses. Not only did the Commission expressly state that it was not then determining whether or not the cost of gas to Chicago District Pipeline Company is reasonable, even as reduced by the contract of forebearance, but the Commission's consent was given with the "express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipeline Company." (R. 45.)

The suggestion that the Commission has approved Chicago District's operating expenses for the life of the contract would have meant that the Commission was giving up the inherent power of the State to regulate Chicago District's rates for a period of 15 years. Obviously the Commission did no such thing, contemplated doing nothing of the sort, and had no legal power to

waive the inherent right of the State to regulate rates of utilities subject to its jurisdiction.

While it is true that the Commission has this year on May 21, denied an application of The Peoples Gas Light & Coke Company for permission to increase its rates to its customers in the City of Chicago, there is now pending in the Circuit Court of Cook County an injunction suit to restrain the enforcement of that order, and the Special Master to whom the case was referred for the taking of proofs, has already rendered a report recommending that an injunction issue and the hearing on exceptions to that report will be heard shortly. The reference of appellant to the citation issued by the Commission against Chicago District Pipeline Company to show cause why its rates should not be reduced, as a basis for appellant's position that the Commission is not justified in requiring appellant to submit the information requested, is without merit since that citation proceeding cannot go on because the Commission is unable to procure the evidence which this court has declared is material to a determination of the proper operating expenses of a company situated as is the Chicago District Pipeline Company.

It should be noted at this point that in addition to the fact that payments to appellant represent more than 95% of the total operating expenses of the Chicago District Pipeline Company, the value of the property of that company is low since it consists only of a relatively small amount of pipe line extending from Joliet, Illinois, at which point the gas is taken from the line of appellant, to the city limits of Chicago. It is readily apparent, therefore, that in determining the rates of Chicago District Pipeline Company, the most

important factor by far is the question of the reasonableness of this item of its operating expenses.

Despite the fact that the Commission has denied the application of The Peoples Gas Light & Coke Company for a rate increase and regardless of the decision of the Circuit Court of Cook County in the injunction suit now pending which has been referred to, the Commission is obliged to enforce the provisions of Section 32 of the Illinois Public Utilities Act which forbids any public utility within the state from charging more than a just and reasonable rate for its services. The Commission, therefore, is under a duty to proceed with its investigation of the rates of Chicago District Pipeline Company.

Appellant argues that if the Chicago District Pipeline and appellant were a common enterprise the Commission could obtain any desired information concerning that enterprise from the local utility, and then concludes from the fact that the Commission has been unable to obtain the information necessary to determine whether or not the price paid by Chicago District Pipeline Company to appellant for gas purchased from it is reasonable, that the presumption that a common enterprise exists is false and arbitrary. That conclusion, of course, is a *non sequitur*. As has already been pointed out,[1] the Commission was unsuccessful in its efforts to obtain this information from the local utility, since the latter claimed that the information must come from the books and records of appellant. As will be shown in more detail later in this brief,[2] if, by the injection of a subsidiary pipeline company between appellant and its actual customers, the local distributing companies,

[1] Page 2, this brief.
[2] Page 30, this brief.

the Commission can be prevented from making the investigation which this court has heretofore said must be made, the Commission will be powerless to regulate adequately the rates of either the subsidiary pipeline company or the local distributing company.

The Commission is charged with the duty under Section 8a of making an investigation when certain facts appear as to the relationship between public utilities under the Commission's jurisdiction and other persons or corporations, and this duty the Commission performed in issuing the order complained of here.

We submit that for the foregoing reasons and others which we shall set out in our argument, it was absolutely imperative that the Commission take the action here complained of in order that the Commission might perform its duty of regulation of an intrastate public utility; that Section 8a of the Public Utilities Act properly construed, authorizes such action, and that neither that section of the statute, nor the order of the Commission complained of deprives the appellant of any of its constitutional rights.

SUMMARY OF ARGUMENT.

1. The order of the Commission is expressly and necessarily authorized by Section 8a of the Illinois Public Utilities Act. (Pages 21 to 27, this brief.)

The decisions of the Illinois Supreme Court require that Section 8a be construed with the other provisions of the Public Utilities Act. Construed in that way it is apparent that Section 8a was enacted in order to aid the Commission in scrutinizing transactions between operating companies and affiliates rather than, as contended by appellant, to aid the Commission in passing on contracts executed after the date of its enactment.

2. Neither Section 8a of the Public Utilities Act nor the order of March 3rd, is in conflict with the Fourteenth Amendment to the Federal Constitution. (Pages 28 to 48, this brief.)

Inasmuch as Section 8a was enacted for the purpose of providing the means whereby the Commission could obtain information necessary to determine whether the public has been fairly dealt with as a result of transactions between intrastate public utility companies and their affiliates, the section sets up a reasonable standard for inquiries into such transactions and is a proper portion of the legislative rate-making process. Its reasonableness is also demonstrated by the equitable principle permitting courts to inquire into transactions between corporations having common directors. The order of March 3rd being authorized by Section 8a is an attempt on the part of the Commission to obtain informa-

tion bearing upon the reasonableness of operating expenses of the Chicago District Company a local utility where rates are under investigation by the Commission. A consideration of the profits of the appellant arising out of the sale of gas to the Chicago District Company is reasonable in the light of the relationship between the Companies, the monopoly character of appellant's business, which is essentially of a public nature, and the fact that the Commission itself was supplied with the estimates of appellant's earnings by one of its officers in an earlier proceeding.

3. The Commission's order complained of does not contravene the Commerce Clause of the Constitution of the United States. (Pages 49 to 64, this brief.)

The purpose of the Commission's order of March 3, 1937, was to obtain information which this court has held as material to a proper determination of lawful rates for an intrastate public utility company, admittedly a proper exercise of the State's regulatory power. The order does not constitute a burden on, nor interference with, appellants' interstate business, and is not a regulation thereof.

4. The court below did not err in denying appellant's application for an interlocutory injunction on the additional ground that the Commission's order complained of was in the nature of a subpoena. (Pages 65 to 67, this brief.)

The Commission admittedly has the power to require the production of material evidence and this court has held that the information requested of appellant is material in cases analogous to this one. The order of the Commission complained of does nothing more than

require the production of such evidence. It therefore is in the nature of a subpoena.

5. This court should not reverse the decision of the statutory court denying an interlocutory injunction since that court did not abuse its discretion or apply improper principles of equity. (Pages 68 to 73, this brief.)

It appeared: (1) that the order of the Commission complained of was duly authorized by the sections of 8a of the Public Utilities Act of Illinois; (2) that 27% of the appellant's common stock was owned by an investment company owning 100% of the stock of the Chicago District Company, an intrastate public utility subject to the jurisdiction of the Commission; (3) that appellant and Chicago District Pipe Line Company have two directors in common; (4) that appellant has a monopoly on the sale of natural gas in the area served by the Chicago District Company; (5) that estimates as to the earnings of appellant had been submitted in an earlier proceeding before the Commission for the purpose of showing the reasonableness of the contract price of gas sold by appellant to Chicago District Company; (6) that the stockholders of appellant were engaged in a common enterprise at the time the transactions, which are presently the subject of the Commission's investigation, were begun; and (7), that there was no infringement on any of appellant's constitutional rights.

6. The court should order the bill of complaint dismissed since appellant has failed to show that any substantial or irreparable injury will result from its compliance with the order of the Commission. (Pages 73 to 76, this brief.)

Appellant's claims as to the damages which it will suffer in the event it is compelled to comply with the

Commission's order complained of here, are conjectural and hypothetical in character. Appellant charges chiefly that injuries will be suffered by it if the Commission reduces the rates of the Chicago District Company. Even assuming that the Constitution protected appellant against such action by the Commission, which we do not admit, the complaint is still premature since the order is only to obtain relevant data. The cost of compliance with the Commission order is nominal both relatively and actually and the protection of the Fourteenth Amendment does not extend to a protection of the conjectural injury alleged by appellants.

7. The appellees are now suffering and will continue to suffer substantial injury if denied access to the information demanded by the order of March 3rd. The Court should disregard the suggestion that even if appellees be found to be entitled to a final decree an interlocutory injunction should be granted. (Page 77, this brief.)

8. The argument set forth at pages 52-54 of Appellant's Brief is not material to the issues in this case. (Page 78, this brief.)

ARGUMENT.

The order of the Commission is expressly and necessarily authorized by Section 8a of the Illinois Public Utilities Act.

(Appellant's Brief, pages 25-28.)

Appellant interprets paragraph 2 of Section 8a, as authorizing the Commission to scrutinize only those contracts with affiliated interests made after the enactment of the section because the Commission by paragraph 3 of this section is given authority to approve contracts with affiliated interests "hereafter made". This argument indicates that appellant fails to appreciate the fundamental purpose of Section 8a and its relationship to the remaining provisions of the Public Utilities Act. It is not true, as appellant suggests, that sub-section 2 of Section 8a relates to the powers conferred in sub-section 3 to approve new contracts, but the act is to be interpreted as a whole. In construing the Public Utilities Act, the Supreme Court of Illinois has said:

> "The statute must be considered as a whole and the intention derived from a consideration of all its clauses and provisions." *Springfield Gas and Electric Company* v. *The City of Springfield* (1920), 292 Ill. 236, 243; 126 N. E. 739.

And this court has held that it will accept the construction of a statute by the highest court of a state. *Missouri Pacific Ry.* v. *Nebraska* (1896), 164 U. S. 403; 41 L. Ed. 489; 17 S. Ct. 130; *Old Colony Trust Co.* v. *Omaha* (1913), 230 U. S. 100, 116; 57 L. Ed. 1410; 33 S. Ct. 967.

The Public Utilities Act, comprehensive in character, was intended to enable the Commission to adequately and fully protect the consuming public in their relations with the local public utilities of the State. The Supreme Court of Illinois has held that the Public Utilities Act "was intended as an effective means of preventing unjust discrimination, undue preferences and extortionate rates and charges by public utilities." *Public Utilities Commission* v. *C. & W. T. Ry.* (1916), 275 Ill. 555, 563; 114 N. E. 325. It has long been established that the fixing of reasonable rates is necessarily dependent upon control over operating expenses. *Chicago & Grand Trunk Ry. Co.* v. *Wellman* (1892), 143 U. S. 339, 345, 346; 36 L. Ed. 176; 12 S. Ct. 400. We submit that the proper construction of Section 8a is that it not only requires Commission approval of contracts between public utilities and affiliated interests, but that it is intended to aid the Commission in the discharge of its rate-making power.

In 1933, the Legislature of the State of Illinois apparently recognized that the provisions of the then existing Public Utilities Act were insufficient to enable the Commission to carry out its statutory obligations. The state was confronted with a problem common to other regulatory agencies and legislative bodies, namely, that the protection and the welfare of the consuming and investing public required control over contracts and other transactions between local operating companies, holding companies and other affiliated interests. This problem was given very serious consideration by governmental agencies concerned with the question of adequate protection of the public in their relations with the utilities. It was during this period that detailed investigations were conducted by Congress through the Federal Trade Commission, by state legislative bodies, and com-

missions; and by many experts who were also concerned with this vital and grave problem.[1] As a result of the attention given by legislative bodies to this problem, 17 states enacted laws somewhat similar to Section 8a.[2] Furthermore, the Public Utility Act of 1935, enacted by Congress, was, perhaps, the most significant attempt to correct the abuses arising out of the relations between holding companies and other affiliates with local operating companies.

Section 8a was but one part of a comprehensive bill (HB 845) enacted during the 1933 session of the legislature. In a message urging its enactment, Governor Horner described this bill as follows:

> "House Bill 845, prepared by the Commerce Commission and submitted to you, seeks to eliminate some of the weaknesses of our present public utility laws, and at the same time so strengthen the Commission's powers as to enable it to protect the public interest in the future. * * * The enactment of the legislation I have suggested will enable an adequate and efficient Commission to go far to assure the public adequate service at reasonable rates, the investor those safeguards necessary to secure his investments, and to accomplish the purposes of state regulation."[3]

In addition to the power conferred upon the Commission to control relations with the affiliates, this bill required utilities to assume the cost of certain investigations (Section 41a); gave the Commission power to prescribe temporary rate reductions (Section 36 as amended); gave the Commission control over invest-

[1] See Utility Corporations, Federal Trade Comm. Rep., Sen. Doc. No. 92, 70th Cong., 1st Sess., part 73-A (1935); Report of New York Comm. on Revision of Pub. Serv. Comm. Law (1930); Report of Massachusetts Special Comm. on Control and Conduct of Public Utilities (1930).

[2] See page 31, this brief.

[3] Message to General Assembly June 6, 1933.

ments and loans to other corporations (Section 27 as amended); conferred upon the Commission power to prohibit payment of dividends (Section 27a); and imposed upon utilities the duty of establishing the value of their property (Section 30 as amended). In other words, the bill was clearly an attempt by the legislature to strengthen the powers of the Commission in order that it might more efficiently and adequately discharge its obligations to the public. The correct interpretation, therefore, of paragraph 2 of Section 8a is that it was enacted in aid of the Commission's general power to protect the public in their relations with the public utilities of the State, and specifically to assist the Commission in the determination of fair and reasonable rates of local utility companies.

As the Commission was (and still is) engaged in an investigation of the rates of the Chicago District Pipeline Company it was proper and necessary that it avail itself of all the provisions of the act which related to its rate-making powers. Since over 95 per cent of the operating expenses of the Chicago District Pipeline Company consists of payments by it to the affiliated appellant for natural gas, it is apparent that the Commission cannot determine the reasonableness of the Chicago District Company's rates to local distributing companies unless it is in a position to determine whether or not its payments to appellant for natural gas constitute proper and reasonable charges to operating expenses.

To suggest that paragraph 2 relates to contracts submitted under paragraph 3 is unsound since it is obvious that the Commission would, under its general investigatory power, have adequate authority to compel the production of any records or data bearing upon any

contract submitted for its approval. It would not have been necessary to have provided in paragraph 2 for authority to demand records or other relevant data bearing upon contracts submitted for the Commission's approval. The limited effect of Section 8a suggested by appellant is wholly inconsistent with a fair interpretation of its provisions.

Appellant also contends (Brief, p. 26) that " the Commission has made it abundantly clear that the data sought will be used to disable the local utility from performing any contract which would be disapproved under Paragraph 3 if hereafter made." There is nothing in the record or elsewhere to sustain this argument. The Commission merely seeks the information in order to determine whether or not the operating expenses and rates of the Chicago District Company are fair and reasonable. The Commission has not pre-judged this proceeding. It has not determined that the operating expenses of the Chicago District Company insofar as they relate to payments for natural gas to the appellant are either reasonable or unreasonable. It has not indicated that it will require the Chicago District Company not to perform its contract with the appellant, but rather has disclaimed any intention of exercising any control over the arrangement. (R. 59.) A fair inference from the appellant's statement is that the contract price is not a proper measure of the fair and reasonable operating expense of Chicago District Pipeline Company.

The question of statutory interpretation involved in *Harriman* v. *Interstate Commerce Commission* (1908), 211 U. S. 407, 419; 53 L. Ed. 253; 29 S. Ct. 115, is not analogous to that presented in this case as is suggested by the appellant in its brief, page 27. This court there

held, "that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint." The rates of the Chicago District Company are a proper object of complaint under the Illinois Public Utilities Act. They have been made the object of complaint by the citation of the Commission directing it to show cause why its wholesale rates should not be reduced. (R. 44.) The investigation contemplated by the order of March 3rd is an essential part of the rate proceeding because the Commission must determine the reasonableness of the operating expenses of the Chicago District Company. It will be powerless to fulfill its statutory obligations if denied the information sought in the order. In order to enable the Commission to determine the reasonableness of rates and operating expenses it has been empowered to obtain information from certain classes of affiliates having transactions with operating companies subject to the Commission's jurisdiction. Thus, the *Harriman* case sustains the Commission's position in the present proceeding.

We concur in the suggestion of appellant that the "power of investigation is not an end in itself; rather, it is a means to an end" (Brief, p. 26). The investigation contemplated by Section 8a and the order of March 3rd is a legitimate phase of the inquiry undertaken by the Commission in determining the reasonableness of the rates and operating expenses of the Chicago District Pipeline Company whose wholesale rates are directly under the jurisdiction of the Commission. These wholesale rates directly affect the retail rates to hundreds of thousands of consumers.

We submit, therefore, that since appellant is admittedly included within two of the classifications set up by Section 8a (R. 4-6) and for the reasons hereinbefore set forth, this Court should affirm the conclusion of the statutory court that the order of the Commission complained of was duly authorized by Section 8a.

Neither Section 8a of the Public Utilities Act nor the order of March 3rd is in conflict with the Fourteenth Amendment to the Federal Constitution.

(Appellant's Brief, pp. 28-36.)

Appellant argues (Brief, p. 31) that the provisions of Section 8a "are arbitrary and capricious in their selection of the persons or corporations to be regulated, are unreasonable and burdensome, are without real or substantial relationship to the object sought to be attained, and therefore deprive appellant of property without due process of law, and deny it the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States." The basis for this contention apparently is that by defining an affiliated interest as either 10 per cent common ownership of the stock of two corporations, or the existence of a common director, the statute arbitrarily establishes the absence of arm's length bargaining. We propose to show not only that the appellant has failed to establish that the provisions of Section 8a are contrary to the Fourteenth Amendment, but also that both the section and the order of March 3rd adequately meet the test of due process laid down by this court.

In *Nebbia* v. *New York* (1934), 291 U. S. 502, 525; 78 L. Ed. 940; 54 S. Ct. 505, the court set forth the principle which determines whether a state statute fulfills the requirement of due process. The court said:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process,

> as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In the consideration of this problem it should first be noted that by the enactment of the Public Utilities Act the Legislature of the State of Illinois has provided for the regulation of public utilities operating within the State of Illinois. The validity of state laws providing for the regulation of railroads, gas, electric and other utilities by an administrative agency, such as the Commission, for the purpose of protecting the consumers and investors in their relations with public utilities, cannot now be questioned. *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission* (1913) 231 U. S. 456, 465, 466; 58 L. Ed. 310; 34 S. Ct. 152; *Chicago* v. *O'Connell* (1917) 278 Ill. 591, 603; 116 N. E. 210.

We have demonstrated that under the provisions of Section 8a the Commission was specifically authorized to enter the order complained of. We have also shown that the section was enacted in furtherance of the policy of the State to broaden and strengthen the powers of the Commission so that it might be enabled adequately to protect the public in its relations with utilities. (P. 24, this brief.)

One of the most important functions of the Commission is to determine the reasonableness of the rates of the utility companies subject to its jurisdiction.[1] Among these companies is the Chicago District Pipeline Company. This court is well aware of the fact that an essential element in the establishment of the reasonable-

[1] Section 32 ff., Chapter 111⅔ Illinois Revised Statutes 1937. *Public Utility Commission* v. *Chicago and West Towns Railway* (1916) 275 Ill. 555, 563; 114 N. E. 325

ness of utility rates is the determination of a proper allowance for operating expenses. *Chicago Ry.* v. *Wellman, supra. Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 78 L. Ed. 1182; 54 S. Ct. 658. In the case of Chicago District this element is of paramount importance because Chicago District is merely an intermediary company between the large local utilities and the appellant and its property would therefore be expected to be of relatively small value. For this reason the valuation of property and rate of return, which are the other two elements to be considered in determining the reasonableness of rates, are of little importance. And again, since the payments of Chicago District for natural gas represent over 95 per cent of its total operating expenses, these payments obviously become the all important element in the determination of the reasonableness of the rates of Chicago District. Thus, if the Commission is to be deprived of the opportunity of getting information as to the reasonableness of this item and must accept as a proper operating expense the price which Chicago District pays appellant under the contract, it will be deprived of substantially all of its power of determining the reasonableness of the rates of Chicago District.

It is therefore indispensable that the Commission be given an opportunity to examine appellant's accounts and records in so far as they concern transactions with the intrastate company for the purpose of determining whether, in fact, the contract price being paid is a reasonable operating expense. As Section 8a provides the power under which the Commission may make such an inquiry, we think it is clear that it is not arbitrary or capricious and that it has a reasonable and proper relationship to the rate-fixing duty imposed upon the Commission.

We submit that the basis upon which inquiries are permitted by Section 8a into transactions between affiliates and local operating companies provides a proper method for discovery and correction of possible abuses arising out of transactions between operating companies and affiliates. The investigations conducted by the Federal Trade Commission and other legislative bodies into the relations between holding companies and other affiliates with operating utilities have disclosed serious abuses in the relationship between operating utilities, holding companies and other affiliates. As a result of these investigations Illinois and 16 other states have given their public utility commissions varying authority over transactions with affiliates.[1] The extent of stock ownership alone necessary to constitute affiliation varies from 5 to 25 per cent.[2]

[1] These states are Alabama, Arkansas, Illinois, Indiana, Kansas, Massachusetts, New Jersey, New York, Oregon, Wisconsin, Washington, New Hampshire, Pennsylvania, Virginia, Maine, Vermont and Connecticut. The New York statute was enacted as a result of the recommendation of the Commission on Revision of the Public Service Commissions Law (p. 26, Vol. I). Sec. 8a of the Illinois Act was patterned largely after the New York law.

[2] 5%. New York (N. Y. Pub. Serv. Law, § 110(2)), Alabama (Ala. Laws 1932 No. 232, § 2), Oregon (Ore. Code Ann., Supp. 1935, § 61-281), Washington (Wash. Rev. Stat. Ann., Remington, Supp. 1935, § 10440-1), Wisconsin (Wis. Stat., 1935, § 196, 51(1)).

10%; Illinois (P. U. Act § 8a(2)), Indiana (Ind. Stat. Ann., Baldwin 1934, § 13957 (2)), Kansas (Gen. Stat. 1935, 66-1401), Pennsylvania (Pa. Pub. Util. Law, Acts 1935, Act No. 286, §§ 2(1), 2(8), 601-604), Virginia (Va. Code of 1936, § 3774-b).

20%; New Hampshire (N. H. Pub. Laws, 1926, c. 258-A, § 1, added by N. H. Laws 1933, c. 182).

25%; Arkansas (Ark. Acts 1935, No. 324; § 1h(1)), Maine (Me. Rev. Stat. 1930, c. 62, § 36-A, added by Me. Laws 1933, c. 213), Vermont (Vt. Pub. Law 1934, Title 28, c. 250, § 6087).

New Jersey provides that no contract involving the expenditure of $25,000 or more made by a public utility with any person or corporation owning, holding or controlling 5% or more of the capital stock of such utility shall be valid unless approved (N. J. Pub. Laws 1935, c. 44 § 1).

The Massachusetts definition employs "substantial control" and "absence of equal bargaining power." (Mass. Gen. Laws 1932, Vol. 2 c. 164, § 85.)

Connecticut defines a "holding company" as a corporation, association or person which "controls a gas, electric or water company." (Conn. Gen. Stat., Supp. 1935, § 1414 c(f)).

Seven states' statutes also define an affiliate as those corporations having officers or directors in common with a local operating company.[3] Nine states, including Illinois, have empowered their commissions to investigate accounts and records of transactions between affiliates and public utilities.[4]

In its effort to demonstrate that Section 8a is arbitrary, appellant (Brief, pp. 35-36) attempts to draw a distinction between the way in which an allegedly similar definition is treated in the Federal Public Utility Act of 1935. The argument, which is based entirely on a purported analogy, is as follows:

The Public Utility Act sets up 10 per cent of stock ownership as constituting a holding company. However, in a succeeding section provision is made for exemption if facts are adduced to show that a 10 per cent stock ownership is not properly determinative of the relationship. The fixed measure of 10 per cent is therefore "tempered". Since Section 8a does not similarly temper its provision, the provision is arbitrary.

Appellants overlooked the fact that the paragraphs which they cite define a "holding company," whereas the same section gives a separate definition (Sec. 2(11)) of an "affiliate" of a specified company (and

[3] New York (N. Y. Pub. Serv. Law Art. 6, § 110 (2) (3));
Kansas (Gen. Stat. 1935, 66-1401 (2) (e));
Virginia (Va. Code of 1936 § 3774b (e));
Illinois (P. U. Act, § 8a (2) (f));
Indiana (Ind. Stat. Ann. Baldwin, 1934, 13957 (2) (e));
Oregon (Ore. Code Ann. 1935, 61-281 (e));
Wisconsin (Wis. Stat. 1935, § 196, 52 (1) (e)).

[4] Alabama (Laws 1932, No. 232, § 10);
Arkansas (Acts 1935, No. 324, § 28);
Illinois (P. U. Act, § 8a (2));
Indiana (Ind. Stat. Ann. Baldwin, 1934, § 13957 (2));
Kansas (Gen. Stat. 1935, 66-1401 (2));
Massachusetts (Mass. Gen. Laws, 1932, Vol. 2, c. 164, § 85);
New Jersey (Comp. Stat., Supp. 1924, § 167-21);
New York (Pub. Serv. Law, § 110 (2));
Oregon (Ore. Code Ann., Supp. 1935, § 61-272 (d)).

Section 8a of the Illinois statute deals with affiliates, and not holding companies, *per se*). This is important because the sections in which the term "holding company" is used are concerned primarily with the reorganization and integration of holding company systems and the control of affiliates as to contracts, accounts and reports is separately dealt with in the Federal Act (Sections 13(e), 15(b)). The definition of "affiliate" sets 5 per cent of stock ownership as the measure of affiliation (Section 2(11)). Thus the very act cited by appellants in their attempt to prove that Section 8a is arbitrary justifies the reasonableness of the standard set up in Section 8a as the basis for scrutiny of relations between operating companies and affiliated companies.

We submit, therefore, that the enactment of Section 8a had a real and substantial relationship to the duties imposed upon the Commission, namely, that it should be able adequately to safeguard the public in their relations with utility companies. This court has held that the test of reasonable control "depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be feared." *Wolff Packing Company* v. *Industrial Court* (1923) 262 U. S. 522, 539, 67 L. Ed. 1103, 43 S. Ct. 630.

In *Nebbia* v. *New York* (1934) 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, the Court reiterated the rule that it will not interfere with a law having a reasonable relation to a proper legislative purpose. There the Court said at pages 537-538 of the official report:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are with-

> out authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio* * * * *Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.*" (Italics ours.)

Appellant's basic contention is that the rule laid down in *Western Distributing Company* v. *Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283, prevents the Commission from considering the profits earned by the appellant from the sale of gas to the Chicago District Company because Section 8a constitutes, without a hearing, a legislative pronouncement that substantial control is actually being exercised over the policies and actions of the local utility. That case was preceded by the decision in *Smith* v. *Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 152, 75 L. Ed. 255, 51 S. Ct. 65, where the court first held that in the determination of the operating expenses of local utilities consideration may properly be given to the profits and earnings of the affiliated or subsidiary supply companies having transactions with operating companies whose rates are in dispute. In *Dayton Power & Light Co.* v. *Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647, and *Columbus Gas & Fuel Co.* v. *Public Utilities Commission* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, the Court also held it proper to go back of a contract in determining the

reasonableness of the local company's operating expenses because of the affiliation of the parties.

In a recent case the Supreme Court of Oklahoma likewise sustained the power of a commission to give consideration to the profits of an affiliated interstate supply company in determining the reasonableness of the operating expenses and rates of a local distributing company, *Lone Star Gas Co.* v. *Corporation Commission of Oklahoma* (1934) 170 Okla. 292, 298, 300, 39 Pac. (2d) 547. After reviewing various cases the court said.

> "This was not an attempt to order the distributor not to pay such sums of money, but rather was an order not to charge, as an item of expense, a sum in excess of the figure found to be the reasonable cost of gas purchased at the city gate. This is a distinction of vital importance in rate making. The rate-making body makes calculations entering into a rate base designed to produce an adequate return. What the company does with its income is no concern of the rate-making body, so long as a full and complete disclosure thereof is made when called for in order that its effect under all the circumstances may be judged properly.
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> * * * * *
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> "Orders entered as to reasonableness of expenditures may indirectly affect or modify or even abrogate the contracts of Community with Lone Star and Holding Company, but this effect is legal and constitutional. *Arkansas Nat. Gas Co.* v. *Arkansas R. Commission* (1923) 261 U. S. 379, 67 L. Ed. 705, 43 S. Ct. 387. The power of the Commission over rates cannot be defeated by contract between a public service company and its consumers. *American Indian Oil & Gas Co.* v. *Geo. F. Collins & Co.* (1932) 157 Okla. 49, 9 Pac. (2d) 438. Public service corporations may enter into contracts between themselves, but may not thereby defeat or avoid the inquiry of the Commission into them and their effect for the purposes of regulation, supervision, and control of services and rates of public service

companies under our Constitution. *Oklahoma Gas & E. Co.* v. *Oklahoma Nat. Gas Co. supra,* and *Oklahoma Gas & E. Co.* v. *Wilson & Co.* (1930) 146 Okla. 272, 288 Pac. 316.

* * * * *

"In our opinion the Commission was clearly correct in demanding information about Holding Company as to the prices of materials as they enter into the physical setup of Lone Star, and the year to year replacements, repairs, and additions. As was said in our opinion on the appeal by Community, there was an indication that there might be shown to have existed and to exist an unreasonable margin of profit in favor of Holding Company when taken into consideration in establishing the present fair value for a rate base in rate-making proceedings."

And in *State Corporation Commission* v. *Wichita Gas. Co.* (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321, consideration of the profits of H. L. Doherty & Co.'s service contract was sustained in determining the reasonableness of the destributing company's rates though it indirectly held but 35% of the voting stock of the local company.

An examination of these decisions indicates that the basis for the rule laid down is that the State is entitled to conduct an investigation of the profits of the affiliate due to the opportunity that might exist for the parties to take an unfair advantage of the public.

In the *Western Distributing Company* case the Court said:

"The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate.

* * *

"It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the

distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition." (285 U. S. 119, 124, 126.)

In the present proceeding the ownership of 27 per cent of the stock of appellant, the affiliated supply company, by the local wholesale company and its parent companies is admitted. While it is true that in the *Western Distributing Company* case the interstate supply company and the local operating company were part of the same system, in the instant case the project involving the production and transmission of natural gas from Texas to Chicago was the result of a common enterprise. That a common interest existed between the companies participating in the pipeline project has been alleged by appellees and not denied. Paragraph 9 of appellees' answer contains the following allegation (R. 57):

"allege that on July 25, 1931, when the contract between the plaintiff, then known as Continental Construction Corporation, and the Chicago District Pipeline Company was entered into, a copy of which contract is set forth as Exhibit A to plaintiff's bill of complaint, and prior thereto during the negotiations leading to the construction of said pipeline project and the execution of said contract, there was a common interest in said pipeline project between Chicago District Pipeline Company and the distributing companies, namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company on the one hand, and plaintiff and persons or corporations owning or controlling stock or other securities of the said plaintiff, on the

> other, by reason of stock holding, interlocking directorates and business understandings between said corporations and persons controlling or representing said corporations."

Furthermore, the appellees have alleged and the statutory court has found that no pipeline company other than plaintiff's operates in or near the territory served by said Chicago District Pipeline Company (R. 57, 95) and the Court has also found "that plaintiff has no competition from wholesalers of natural gas in the Chicago area." (R. 95, Finding of Fact 22.) Since the companies participating in the natural gas project were engaged in a common enterprise and, since appellant has no competition for the sale of natural gas, it follows that the "usual safeguards of bargaining and competition" do not exist.

We submit, therefore, that if it is reasonable and proper to scrutinize transactions between operating companies and affiliates under the circumstances existing in the *Smith* and *Western Distributing Company* cases because of the opportunity of taking unfair advantage of the public, the equally serious opportunities for unfair dealing with the ratepayers which exist in the situation now before this court also warrant probing of the profits of the affiliated supply company. If, as a matter of law, payments to appellant for natural gas are not to be subject to scrutiny, The Peoples Gas Light and Coke Company, the principal purchaser of the gas, might be free to demand, as it has, a substantial rate increase. (R. 45.) Yet, at the same time, the stockholders of that company would be able to profit from the payment of excessive prices for natural gas due to the ownership of 27 per cent of the stock in that company. The operating company would argue that the income re-

ceived from the ownership of stock must be treated as non-utility income. Thus, if appellant is successful, actual and effective regulation of Chicago District and The Peoples Gas Light and Coke Company rates could be avoided by Chicago District's long-term supply contracts for the purchase of natural gas. This case demonstrates the reasonableness of the standard for inquiry into transactions with affiliates set forth in Section 8a.

Appellants have also contended that a statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment, and that legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, and property.

All of the statutes considered in the cases cited by appellants as authority for the proposition that Section 8a of the Public Utilities Act is void,[1] have, without exception, provided that where one fact is proved, the ultimate fact at issue is thereby conclusively established. For example, in *Schlesinger* v. *Wisconsin* (1926) 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 260, an inheritance tax statute was involved which provided that gifts made six years before death were to be conclusively presumed as having been made in contemplation of death. The ultimate issue in determining whether a gift can be taxed under the inheritance statutes when made during the life-time of the donor is always whether or not the gift was made in contemplation of death. If it can be shown to have been such it is taxable; if not it goes free of the burden. The vice of the statute lay in the fact that the ultimate question to be determined was

[1] Appellant's Brief, pp. 33-35.

conclusively presumed when evidence tending to prove the date of gift was established.

We submit, however, that Section 8a of the Public Utilities Act is properly construed as delegating to the Commission the duty of determining whether or not an affiliate, as that term is defined in the statute, has taken an unfair advantage of its related local public utility company whenever the facts are such as to fall within one of the eight classes set up by Section 8a. Applying an analysis to this section similar to the one applied to the cases cited by appellant at pages 33, 34 and 35 of its brief, it is immediately apparent that the ultimate issue involved under Section 8a is whether or not a corporation or person has taken advantage of an affiliated domestic public utility. The statute makes no fact or facts give rise to a conclusive presumption as to this. The ultimate issue, therefore, still remains to be proved even though under Section 8a the Commission makes the investigation provided for therein. As we have already pointed out hereinbefore the classification set up in Section 8a is reasonable and entirely relevant to the fundamental object sought to be attained by the Public Utilities Act of Illinois.

The propriety of Section 8a and the order of March 3rd as against an allegation of conflict with the 14th Amendment has, in effect, been sustained in *State Corporation Commission of Kansas* v. *Wichita Gas Company, supra.* Here this court held that an order of the Kansas Commission directing a utility company not to charge more than a certain amount to its operating expenses on account of payments made to an affiliated supply company did not set up a basis for injunctive relief in the Federal courts. The Court held that the order was legislative in character. Like the order in

dispute in this case the Kansas Commission's order was a step in the legislative process of rate making.

This case arose under Chapter 239, Kansas Laws, 1931, which is substantially similar to Section 8a. The Kansas Commission was given jurisdiction over affiliated interests which were defined in substantially the same language as are "affiliated interests" in the Illinois law. The Commission was given access to the accounts and records of affiliated interests and the authority to require reports relating to transactions by such affiliated interests with local operating companies. In addition to the provisions similar to Section 8a a showing of the cost of service was required as to all contracts with affiliated interests before approval.

Pursuant to the provisions of the law, the Commission instituted proceedings to determine the reasonableness of charges by holding companies and affiliates for service and supplies rendered to distributing companies engaged in supplying gas. Extended hearings followed during which considerable evidence was submitted as to the value of the pipeline company's properties, its operating expenses including depreciation and taxes, its gross revenues and income available for return. Following the hearing the Commission entered two orders, the first of which directed the Wichita Gas Company to cease setting aside as an expense item the 1¾% gross charge paid to Henry L. Doherty and to cease setting aside as an operating expense in excess of 30c per mcf for gas purchased from the Cities Service Gas Company, an interstate transmission company. The second order required all distributing companies paying a gate rate in excess of 30c per mcf to deduct the difference between such payment and what the distributing company was then paying at the city gate and to pass the difference to

the consumer. While the only companies before the Commission were the local distributing companies, suit was instituted in the Federal Court to enjoin both orders not only by the local operating companies but also by Cities Service Gas Company, the affiliated interstate pipeline transmission company. Permanent injunctions were granted by the Federal District Court against both orders. (2 Fed. Supp. 792.) This Court, however, reversed the injunction orders insofar as they prevented enforcement of the first order, holding that an order of the Commission directing the distributing companies to cease setting aside as an expense item the payment of a management fee to an affiliated company was legislative in character and that the Commission's proceedings were to be regarded "as having been taken to secure information later to be used for the ascertainment of reasonableness of rates."

If the order in the *Wichita* case did not confer jurisdiction upon the federal courts due to its legislative character the same rule should be applied to the instant proceeding where the order under attack merely requests information. We quote in detail from the opinion of the Court because of the application to the present proceeding:

> "The first order does not purport to establish or prescribe prices to be paid by the distributing companies to the pipe line company or purport to establish any rate to be charged by appellees to their customers. It merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any payments in excess of that price in fixing a rate for domestic consumers.
>
> "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an

order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted. *Terrace* v. *Thompson*, 263 U. S. 197, 214, 68 L. ed. 255, 44 S. Ct.

"Appellees in substance suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. • • •

"It results, therefore, that appellees in their complaints failed to state facts sufficient to entitle them to a decree enjoining the appellants from enforcing the first order far, as insisted by appellants in oral argument in this court, the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellees' rates, and they have no binding force in respect of payments to the pipe line company or rates to be charged consumers and cannot be res adjudicata. The decree in so far as it enjoins enforcement of the provisions of that order will be vacated." (Italics ours.) (290 U. S. 561, 568, 569.)

In that case, the statute which authorized the order complained of was substantially similar to Section 8a. We submit therefore that the *Wichita* case is direct authority for the proposition that Section 8a is a valid and reasonable part of the legislative rate-making process.

We submit that Section 8a, as well as the order of March 3rd, is reasonable and proper when considered in the light of the established principle of equity that transactions of two corporations will be scrutinized in order to determine their fairness whenever the Board of Directors of such corporations have members in common.

Among the decisions upholding this principle are *Geddes et al.* v. *Anaconda Copper Mining Company et al.* (1921) 254 U. S. 590, 599, 65 L. Ed. 425, 41 S. Ct. 209, where the Court said:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588; *Thomas* v. *Brownville, Ft. Kearney & Pacific R. R. Co.*, 109 U. S. 522; *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 90."

In the case of *Corsicana National Bank* v. *Johnson*, (1919) 251 U. S. 68, 90, 64 L. Ed. 141, 40 S. Ct. 82, the Court stated as follows:

> "The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does

not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 589; *Wardell* v. *Railroad Company*, 103 U. S. 651, 657, *et seq.*;"

In *Caldwell* v. *Dean* (1925) 10 F. (2nd) 299, the Court said on page 306:

"There could be no dispute as to the law governing the case. It is well settled that, when a contract made by one corporation with another, through their boards of directors, having common members, is challenged, the courts will scrutinize the transaction closely, and set it aside unless it clearly appears to be fair and just in every respect."

Since it is proper for a court of equity to closely scrutinize such transactions for the purpose of determining whether the stockholders have been fairly dealt with, we insist that it is equally important as a matter of law that a regulatory agency such as the appellee Commission should have authority to scrutinize transactions between such corporations in order to determine whether the transactions are fair to the public. The obligation of utility corporations to deal fairly with the consuming public is one generally recognized by the courts. The Commission, as the duly authorized agency of the State, obligated by law to assure the

consuming public of fair dealings, must be permitted to examine into the effect of contracts between affiliated corporations for the purpose of determining whether the public has been fairly treated. This principle also demonstrates the reasonableness of the standard set forth in Section 8a.

Justification for consideration of the profits of appellant under the *Smith* and *Western Distributing Company* cases in determining Chicago District's operating expenses is also found in the character of appellant's operations. This is true notwithstanding the fact that appellant's rates are not subject to regulation and the Commission has disclaimed any intention to control its rates. Its business is, nevertheless, essentially of a public utility character. In its original bill of complaint it has stated (R. 2) that it is "engaged in the sale, transportation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois." The record also shows that 85 per cent of the gas transmitted is sold to the Chicago District Company, and in turn, by that company to Illinois distributing companies. The gas-consuming public of the State of Illinois has a direct and vital interest in its business since it is directly dependent upon the appellant for its supply of gas.

It has long been established that the business of companies such as the appellant is essentially of a public nature. Companies engaged in the supply of gas have been regulated as to rates, service, facilities, etc. (*German Alliance Insurance Company* v. *Lewis* (1914) 233 U. S. 389, 407, 58 L. Ed. 1011, 34 S. Ct. 612.) In *Pennsylvania* v. *West Virginia* (1923) 262 U. S. 553, 557, 558, 67 L. Ed. 1117, 43 S. Ct. 658, the Supreme Court

has held that the business of interstate natural gas pipelines "is of a *quasi* public character." Oil pipelines have also been held to be public utilities and as such subject to regulation. *Producers Transportation Company* v. *Railroad Commission* (1920) 251 U. S. 228, 64 L. Ed. 239, 40 S. Ct. 131; *United States* v. *Ohio Oil Company* (1914) 234 U. S. 548, 58 L. Ed. 1459, 34 S. Ct. 956.) Even if the business of the appellant was limited to the supply of gas service at wholesale it would still be subject to public control. In *Carey* v. *Corporation Commission of Oklahoma* (1934) 168 Okla. 487, 33 Pac. (2d) 788, it was held that a company selling natural gas at wholesale to municipal plants engaged in the local distribution of gas was a public utility subject to regulation by the Oklahoma Commission. In *North Carolina Public Service Company* v. *Southern Power Company* (1922) 282 Fed. 837, it was held that a power company engaged in the furnishing of wholesale electric service to independent vendors was adjudged to be a utility so that it could not discontinue service to a distribution company to whom it had contracted to supply electric energy and where the contract had expired.

As these decisions demonstrate conclusively the public character of appellant's business, whether its rates are subject to direct regulation or not, it would appear that the Commission under the *Smith* and *Western Distributing Company* cases would be amply justified in giving consideration to the cost of service principle (*i. e.* fair return upon value or cost of property) in determining the reasonableness of Chicago District's operating expenses.

The reasonableness of an inquiry into the earnings experience of appellant has also been established by the fact that it submitted estimates of earnings over the

life of the contract to the Commission when the reasonableness of Chicago District Pipeline wholesale rates was before the Commission (R. 48). If it was reasonable and proper to consider these estimates of the earnings experience of the appellant in determining the reasonableness of the operating expenses and rates of the Chicago District Company, then it is equally as important and essential that the Commission be given an opportunity to consider the actual earnings of the appellant under the contract five years after the contract was entered into. By submitting the estimates appellant has itself admitted the reasonableness and the propriety of the inquiry authorized by Section 8a and the order of March 3rd.

We submit, therefore, that Section 8a is not arbitrary or capricious and that it bears a reasonable relationship to the objects sought to be attained by the Public Utilities Act of the State of Illinois.

The order of the Commission complained of does not contravene the Commerce Clause of the Constitution of the United States.

(Appellant's Brief, pp. 37-41.)

The order of the Commission complained of here does not contravene the Commerce Clause of the Constitution of the United States, since it constitutes neither a regulation of, nor an interference with, interstate commerce as those terms are used by this court in determining the constitutionality of state legislative action.

Appellant claims (Brief, pp. 37 to 41) that the order does contravene the Commerce Clause. The argument upon which that conclusion is based is misleading in its implication as to the proper construction to be given both to the order and to Section 8a of the Public Utilities Act upon which said order is based, and is, we submit, erroneous in law. We have no quarrel with the proposition that appellant is engaged in interstate commerce, nor do we question its non-resident status. We submit, however, that the fact that appellant is a foreign corporation, engaged in interstate commerce is not in itself a sufficient basis for the issuance of an injunction to restrain the enforcement of the Commission's order complained of here.

The wording of the general commerce clause "the Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes," has been construed as having the negative implication of forbidding the regulation or burdening of interstate commerce by the states.[1]

The power to regulate was defined in *Second Em-*

[1] *Baldwin* v. *Seelig* (1935), 294 U. S. 511; 79 L. Ed. 1032; 55 S. Ct. 497; and cases there cited.

ployers' Liability Cases (1912), 223 U. S. 1, 47; 56 L. Ed. 327; 32 S. Ct. 169, as the power to "foster, protect, control and restrain." "Regulation" therefore must be taken to mean the fostering, protection, control or restraint of interstate commerce. Actually, the order of the Commission does none of these things. We have already discussed in necessary detail exactly what the order of the Commission amounts to.[1]

Appellant in its brief has argued that the order of the Commission places on appellant the burden of showing the reasonableness of gas sold to Chicago District Pipeline Company. To begin with, this is not the "burden" which the states have been forbidden to place on interstate commerce. Actually, all that the Commission has done in this case is to request the appellant to produce evidence material to the issue which this court in *Western Distributing Company* v. *Public Service Commission of Kansas* (1932), 285 U. S. 119; 76 L. Ed. 655; 52 S. Ct. 283; *Smith* v. *Illinois Bell Telephone Company* (1930), 282 U. S. 133; 75 L. Ed. 255; 51 S. Ct. 65; *Dayton Power & Light Co.* v. *Public Utilities Comm.* (1934), 292 U. S. 290; 78 L. Ed. 1267; 54 S. Ct. 647; and *Columbus Gas and Fuel Co.* v. *Public Utilities Commission of Ohio* (1934), 292 U. S. 398; 78 L. Ed. 1327; 54 S. Ct. 763, said a state commission was justified in investigating to determine the reasonableness of the rates of local distributing companies where there were supply contracts in existence between those local distributing companies and affiliated interstate operators.

In *Western Distributing Co.* v. *Public Service Commission* (1932), 285 U. S. 119, 123; 76 L. Ed. 655; 52 S. Ct. 283, it was said:

"*First:* The appellant asserts that the rate

[1] Pages 25-26, this brief.

charge by the pipe line company for gas delivered at the city gate is an interstate rate and not the subject of regulation by any state authority. The soundness of this contention is conceded by the appellees. But the appellant argues that any inquiry by the state commission into the reasonableness of this charge amounts to an indirect attempt at regulation, an effort on the part of the state to circumvent the paramount federal authority over interstate commerce, and hence an attempt to do by indirection what is forbidden by the Federal Constitution. The appellees disclaim any intent to control rates charged for interstate service, but say that as the Commission's function is to set reasonable rates for the intrastate service rendered by appellant in the city of Eldorado, this necessarily requires a determination of the question whether the price paid for the gas distributed is fair and reasonable. To this end the Commission insists upon its authority to make such investigation as will satisfy it upon this point.

"Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for

> an interstate service, does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

That case cannot be distinguished from this one on the ground that here the distributing group holds only a 27% stock interest in the pipeline company, as compared with the total common ownership in the *Western Distributing Company* case, since, as has been alleged in the answer (R. 57), there was a community of interest between the gas producing and distributing groups at the time the contract was entered into, and

> "The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part, the basis of the retail rate." *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, 124.

Certainly if there was no regulation of, interference with, or burden on interstate commerce in the *Western Distributing Co.* case, *supra,* or in *Dayton Power and Light Company* v. *Public Utilities Commission of Ohio, supra, Columbus Gas and Fuel Co.* v. *Public Utilities Commission of Ohio, supra, Smith* v. *Illinois Bell Telephone Company, supra,* there is none here. The decisions in those cases also destroy the force of appellant's argument as to the injury which will result from its compliance with the Commission's order since, if it is disclosure of the facts which will cause the damage the source of the information is immaterial.

Appellant argues that the fact that in the instant case the information is required of the interstate operator creates a burden on interstate commerce. We have

already shown the reasonableness of this legislative action. If the Commission has the power to inquire into the reasonableness of charges to local utilities under supply contracts with affiliates, and we have already shown that this is so, it may secure the necessary information from the best source, namely, the corporation actually keeping the records which show the facts material to the determination of this question. In the instant case that is appellant. An effort was made to secure the information from Chicago District Pipeline Company but it claimed that it was unable to furnish it. The Commission would have been derelict in its duty had it failed to exercise the power vested in it by the legislature of Illinois to secure information necessary to perform its regulatory function. Moreover, it is immediately apparent that in the cases last cited above, even though there was no direct request of the interstate operator, the information which this court considered as material could come only from the interstate supply company's records, so that this court has already approved securing such information from interstate operators.[1]

If it be held that the Commission cannot properly require appellant to produce this information the Com-

[1] Note that in *Smith* v. *Illinois Bell Telephone Company*, *supra*, the witnesses who actually testified as to the reasonableness of the payments by the local operating company to American Telephone and Telegraph Company, the parent company, and the Western Electric Company, an affiliate of Illinois Bell Telephone Company, under supply and service contracts, were officers and officials of American Telephone and Telegraph Company, an interstate operator, and the Western Electric Company. Some of those witnesses and the reference to the places in the record filed with this court at which their testimony appears, are:

Bickelhaupt (R. 270).
Crunden (R. 300, 522, 607, 742, 1403 1434).
Gregory (R. 309, 342, 433, 562, 1069, 1274, 1330, 1367).
Ghefardi (R. 526, 2242).
Heiss (R. 819, 841, 881, 909, 1086, 1144, 1155).
Jewett (R. 611, 2143, 2167).

mission will be prevented from making the investigation which this court considered necessary in the *Western Distributing Company* case and the other cases last cited.

Appellant's point here really amounts to the proposition that a person engaged in interstate commerce cannot be required to give evidence before an administrative tribunal. No cases are cited by appellant as authority for that proposition.

Appellant has cited *International Text Book Co.* v. *Pigg* (1910), 217 U. S. 91, 112; 54 L. Ed. 678; 30 S. Ct. 481 (Appellant's Brief, pp. 39 to 40) as announcing the rule which controls in this case. We submit that the case must be distinguished from the instant case on several grounds. In that case the Kansas legislature had enacted a law requiring that every foreign corporation doing business within the state file certain reports as to its financial condition and business and made the filing of these reports a condition precedent to the right of any foreign corporation to maintain a suit in the state courts. The Text Book Company was engaged, as the court found, in the interstate communication of intelligence in its operation of correspondence courses. The defendant in error, Pigg, had enrolled as a student, had made a partial payment on the tuition fee but had failed to pay the balance due. When suit was brought by the creditor in the state courts of Kansas it was pleaded that the plaintiff had failed to comply with the provision of the statute referred to above and that, therefore, it had no right to maintain its action. This contention was concurred in by the state courts but this court, declaring the statute to be an unconstitutional regulation of interstate commerce, set aside the judgment of the Supreme Court of Kansas.

That case must be distinguished from the instant one since as has been already pointed out[1] the Commission's order here was entered in pursuance of the Commission's duty to fix just and reasonable rates for Chicago District Pipeline Company. In the *International Text Book* case it does not appear as it does here that the reports were required for the purpose of assisting the state government in performing what is conceded to be a valid legislative function—namely, to fix rates for an intrastate public utility.

In the *International Text Book Company* case, *supra*, there was actually a regulation of interstate commerce since the statute imposed a condition precedent to the carrying on of commerce between the states. There is no claim made here by appellant, and one could not be made, that either Section 8a of the Public Utilities Act or the order of the Commission sets up any condition precedent to the right of appellant to carry on its interstate business in the State of Illinois. Even if the order in question is not complied with, the statutes of Illinois provide no means by which the state could prevent appellant from continuing its interstate business, regardless of the validity of such a prohibition.

International Text Book Co. v. *Lynch* (1910), 218 U. S. 664; 54 L. Ed. 1201; 31 S. Ct. 225, and *Buck Stove Company* v. *Vickers* (1912), 226 U. S. 205; 57 L. Ed. 189; 33 S. Ct. 41, are based entirely upon the conclusion reached by this court in *International Text Book Co.* v. *Pigg, supra*, and the distinctions pointed out with regard to that case apply with equal force to both of the later cases.

State ex rel. Cities Service Gas Company v. *Public*

[1] Page 29, this brief.

Service Commission (1935), 337 Mo. 809; 85 S. W. (2d) 890, is cited by appellant as one involving precisely the same situation as is involved in the instant case. When that case is properly analyzed the distinctions between the situation there and here are immediately apparent. In that case the Missouri Public Service Commission began a proceeding on its own motion against the Cities Service Gas Company, referred to in the court's opinion as the Pipe Line, and various local distributing companies subject to the same common ownership and control as the Pipe Line Company. The purpose of the proceeding was "to determine if the Pipe Line was a public utility engaged in the sale and distribution of industrial gas in Missouri and as such required to file schedules of rates."[1]

The conclusion of appellant (Brief, p. 41) that the order of the Missouri Commission did not purport to regulate the rates charged by the interstate company nor to require a valuation of its properties, but merely directed it to file schedules of the rates it charged distributing companies and industrial concerns is misleading. That statement can only be due to an entire misconception of the functions of a public utility regulatory body. If the Pipe Line company in the Missouri case had been—as the Missouri Commission found—engaged in an intrastate business as a public utility and obliged to file with the Commission its schedule of rates and its rules as to service, the Commission would have had the same full and complete power and authority over the pipe line company as it has over other intrastate public utility companies. The fact that in the proceeding then before the Commission there was no question as to the reasonableness of the rates and charges, does not affect

[1] 337 Mo. 809, 814.

the fact that the inquiry in the Missouri case was to determine whether or not the interstate pipe line company was engaged as an intrastate public utility so as to obligate the company to comply with the Public Utilities Act of Missouri and the rules and regulations of the Missouri Public Service Commission.

No such problem is involved here. It is not now claimed, it was not claimed in the lower court, nor was it claimed before the Commission, that appellant is engaged in an intrastate business in the State of Illinois as a public utility. Nor is it proper to compare a requirement that a corporation file its schedule of rates and charges with a public service commission with the requirement in question in this case, since any individual or corporation which would be required to file its rates and charges with the Missouri Public Service Commission (and in this respect the Public Utilities Acts of Missouri and Illinois are similar) would be subject to the jurisdiction of the Public Service Commission as to rates and charges.

Appellant has pointed out that the petition to this court for a writ of certiorari was denied in this case. *Public Service Commission et al.* v. *Missouri, ex rel. Cities Service Gas Company* (1936), 296 U. S. 657; 80 L. Ed. 468; 56 S. Ct. 382. An examination of the petition for a writ of certiorari and the answer thereto discloses that the issue made by the parties concerned was as to the right of a state public utility commission to secure, by writ of certiorari from this court, a review of a decision of the State Supreme Court against the Commission. Distinction of this case leaves no authority supporting appellant's contention.

We should like to call the court's attention to certain cases which we believe are in point as to this situation.

In *Interstate Commerce Commission* v. *Goodrich Transit Company* (1912), 224 U. S. 194, 211, 216; 56 L. Ed. 729; 32 S. Ct. 436, a water carrier had brought suit in the Federal District Court to restrain the Interstate Commerce Commission from enforcing certain sections of the Interstate Commerce Act as to reports and accounting systems. The company claimed that only 20 percent of its business involved carriage by both rail and water and that the remainder of its business was interstate and intrastate port to port carriage, and that since the Interstate Commission had authority only over commerce between the states and over transportation by rail and by joint use of rail and water facilities, enforcement of the Commission's rules as to reports and accounting practices as to all of the carrier's business amounted to the imposition of a burden on both its water transportation service and its intrastate business.

As in this case, the court was obliged first to determine whether or not the statute complained of covered the case, and the court arrived at the conclusion that it did. And it is interesting to note that the construction was in part, at least, based upon what the court considered to be the necessity of so construing the act as to permit the Interstate Commerce Commission to perform efficiently and adequately the duties imposed upon it by the Congress. The court then came to the conclusion that the statute was neither a regulation of, nor a burden on, the intrastate business of a carrier saying at page 211 of the official report:

> "It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such ac-

counts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them."

and at page 216:

"Bookkeeping, it is said is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority."

In *People ex rel. Stead* v. *Chicago, Indianapolis and Louisville Railway Company, et al.* (1906) 223 Ill. 581. 79 N. E. 144, the Supreme Court of Illinois had before it an original petition for mandamus brought by the Attorney General of the state against a non-resident railway company, praying for a temporary order directing the respondents to report to the Railroad and Warehouse Commission, as required by Section 6 of the Railroad and Warehouse Act.

At page 587 of the official report the court quotes Section 6 of the Act as follows:

> " 'Every railroad company incorporated or doing business in this State, or which shall hereafter become incorporated, or do business under any general or special law of this State, shall, on or before the first day of September, in the year of our Lord 1871, and on or before the same day in each year thereafter, make and transmit to the commissioners appointed by virtue of this act, at their office in Springfield, a full and true statement, under oath of the proper officers of said corporation, of the affairs of their said corporation, as the same existed on the first day of the preceding July.' Then follow forty-one clauses designating, in detail, the subjects upon which the report shall furnish information,"

It is apparent from the opinion that the railway company there advanced almost exactly the same arguments as those advanced by appellant and in arriving at the conclusion that the peremptory writ of mandamus should be granted the court, at pages 592, 593, had this to say on the question presently before this court:

> "In the light of these authorities, what should be the rule in the case at bar? Here the State has created an administrative agency, called railroad and warehouse commission. It has enjoined upon this commission certain duties, among others, to examine into the condition and management and all other matters pertaining to railroads, so far as the same concern the relation of such roads to the public and the accommodation and security of persons doing business therewith. They are required to report such facts, statements and explanations to the Governor once each year as will disclose the actual working of the railroad system of transportation, in their bearings upon the business and prosperity of the people. All this is, manifestly, for the purpose, in part, at least, of uncovering the necessity for such corrective legislation as the State may

properly enact. How is the commission to perform these duties unless it has some means of obtaining the necessary data upon which it can act, and such as the executive and legislative branches of the government will require as a guide in the application of appropriate remedies? *Section 6 meets this requirement and is the superstructure of the whole act. This law does not impose any tax or license on the business or the property of the company. It does not direct when or how its trains shall be run, or seek to direct, manage or control its internal affairs. So far as this particular section is concerned, it, in effect says: 'Do your business in your own way, but report to the people of the State once a year what you have, what you are doing and how you are doing it.' This, in our opinion, is not a restriction or a burden on inter-State commerce, within any rule laid down in any of the adjudged cases.* If it be said that the information called for may be used as the basis of some future unconstitutional legislation, we reply that it will be time enough to meet that emergency when it arises, if it ever does." (Italics ours.)

The analogy between that case and the instant one is complete.[1]

The State Supreme Court of Kansas had before it in *State of Kansas ex rel. Public Utilities Commission* v. *Atchison, Topeka and Santa Fe Railway Company* (1923) 115 Kan. 3, 221 Pac. 259, and same title (1924) 116 Kan. 151, 225 Pac. 1026, an application by the Attorney General for a mandamus to compel a domestic corporation engaged in interstate carriage to allow an examination of its books and records primarily as to additions and betterments in accordance with an order of the Kansas Public Utilities Commission. The two opinions were written in the same proceeding, the only

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1 Similar decisions are *Railroad Commission of Texas* v. *Texas & Pacific Ry. Co.* (1911) 140 S. W. 829, and *Texas & Pacific Ry. Co.* v. *Railroad Commission of Texas* (1912) 105 Tex. 386, 150 S. W. 878.

difference being that after the first opini . the defendants filed an answer in which the only new fact that appeared was that the order of the Commission was for the purpose of obtaining evidence for a proceeding then pending before the Interstate Commerce Commission which had been begun by the State Commission. The Supreme Court of Kansas granted the writ prayed for, holding that there was no regulation of interstate commerce nor any burden imposed thereon. The Court likewise pointed out that under the Kansas Public Utilities Act the commission was charged with the duty of beginning and carrying on necessary proceedings before the Interstate Commerce Commission to secure reasonable rail rates within the state and that it was in furtherance of this statutory duty that the action alleged by the railroad company to be unconstitutional was taken.

In the instant case the Public Utilities Act of Illinois imposes upon the Illinois Commerce Commission, the duty of enforcing that section of the Act which limits intrastate public utility companies to a collection of reasonable rates and charges. As has already been pointed out to the court a material consideration in the determination of the reasonableness of public utility rates is the allowance which must be made for operating expenses. The legislature by Section 8a of the Public Utilities Act has imposed upon the Commission the burden of looking behind contracts and transactions between certain individuals and corporations described in the statute as "affiliated interests." The Commission's order of March 3, 1937, complained of here, was entered pursuant to this statutory obligation. It is precisely the same situation which the Kansas Supreme Court approved in the two cases last referred to.

In *Atlas Pipe Line Co.* v. *Sterling, et al.* (1933) 4 F. Supp. 441, a three-judge court, organized pursuant to Section 266 of the Judicial Code, considered the complaint of a common carrier pipe line company, engaged in transporting oil in interstate commerce, that certain orders of the Texas Railroad Commission were unconstitutional. These orders required plaintiff (1) to install meters to enable the Commission to determine the amount of oil transported by it, (2) to file with the Commission on various forms reports required of transporters of oil, and (3) to allow the Commission or its duly authorized agents to inspect plaintiff's books and records when the Commission might deem it necessary. The plaintiff attacked the orders as does the appellant here on the ground that they violated the 14th Amendment and the commerce clause and the court had this to say, at p. 443, about these contentions:

> "Certainly it goes without saying that the terms of a statute or the orders and actions of the commission under it might be so burdensome and exacting as in effect to prevent or prohibit, contrary to the Fourteenth Amendment and the commerce clause, the conduct of the legitimate business of interstate transportation by pipe line. No such burdensome exactions are, however, shown to have been imposed here. It is hardly claimed, it is certainly not proven, that the requirements of the commission cannot be complied with without visiting irreparable injury on plaintiff. What is in effect asserted is that, since plaintiff is engaged in the business of transporting oil, an article of interstate commerce, the commission may not, in regard to reports and disclosures, impose duties upon it which require an expenditure of time, money or effort by it. We think the decisions cited do not support this view. The state may subject interstate, as well as intrastate carriers to reasonable police regulations for the purpose of enforcing the public policy of the state in regard to shipments into or out of it." (Citing cases.)

That case is, we submit, squarely on the point involved here.

As has already been pointed out[1] the plaintiff's claims as to the damage which enforcement of the Commission order will inflict are highly exaggerated in view of the former willingness of the plaintiff to submit estimates and data as to the experience of the first few months as to its business.

We have shown, we submit,[2] that the Commission's action in investigating the reasonableness of the payments to appellant does not contravene the Commerce Clause of the United States Constitution; and[3] that the order of the Commission is not rendered invalid because it requires appellant, the only person who would have full, complete and adequate knowledge and record of the material facts, to submit such facts to the Commission.

We submit, therefore, that on the only reasonable interpretation of the Commission's action and on the basis of the authorities cited, the order complained of does not contravene the Commerce Clause of the Constitution of the United States.

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1 Pages 47, 73ff, this brief.

2 Pages 49ff, this brief.

3 Page 53, this brief.

The court below did not err in denying appellant's application for an interlocutory injunction on the additional ground that the Commission's order complained of was in the nature of a subpoena.

(Appellant's Brief, pp. 41-43.)

Despite appellant's argument to the contrary, there is no inconsistency between the memorandum of the court below and its Findings of Fact and Conclusions of Law. (R. 89-97.) Not only did the court below suggest in its memorandum that the order of the Commission complained of here was justified as being in the nature of a subpoena to require the production of material evidence before the Commission, but the statutory court also *found* (R. 96)

> "The order of March 3, 1937, is valid and proper under the police power of the State of Illinois, since it is in the nature of a subpoena to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction."

As we have already pointed out[1] the Commission's order only requires appellant to produce certain evidence in a proceeding now pending before the Commission. A "subpoena" is defined as the process by which the attendance of a witness is required. A subpoena *duces tecum*, of course, is one issued for the purpose of compelling a witness to bring with him certain books, records or documents.[2]

Since the Commission's order requires a report, which is substantially the equivalent of testimony, and since the only difference between the requirement of a sub-

1 Pages 25-26, this brief.

2 Black's Law Dictionary, 3rd Ed., p. 1669.

poena *duces tecum* and the order is that under the former the books and records must be produced for examination before the body hearing the evidence while under the latter the books and records will be examined by agents of the Commission which will hear the evidence while the books are in the hands of appellant, there is no substantial difference between the Commission's order and a subpoena *duces tecum*.

We have already demonstrated, we submit, the materiality of this evidence,[1] so that when appellant concedes, as it must, that "The Commission is given undoubted authority by the Public Utilities Act to subpoena evidence which is relevant and material to any proceeding pending before it over which it has jurisdiction"[2] it has conceded the Commission's right to this information.

The Commission by this order is not asserting the same jurisdiction over appellant's books and records as is exercised over those of public utilities which the Commission regulates, as appellant claims. Section 8a of the Public Utilities Act as has hereinbefore been pointed out authorizes the Commission to inquire into transactions of appellant only with such of its affiliates (as defined in the act) as may be public utilities subject to the Commission's jurisdiction. In this case the order was limited to an inquiry as to transactions with Chicago District Pipeline Company. As is shown by Section 63 of the Illinois Public Utilities Act[3] the Commission has the power to investigate the books and records of a public utility subject to its jurisdiction at any time and for any purpose.

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1 Pages 25, 29, this brief.

2 Page 42 Appellant's brief.

3 Appendix B, page 73, Appellant's Brief.

We submit, therefore, that if the Commission's order which appellant seeks to enjoin is compared with a subpoena which the Commission undoubtedly has power to issue, it is clear that appellant is not entitled to injunctive relief and the statutory court did not err in denying appellant's application for an interlocutory injunction on that additional ground.

This court should not reverse the decision of the statutory court denying an interlocutory injunction since that court did not abuse its discretion or apply improper principles of equity.

(Appellant's Brief, pp. 44-47.)

The statutory court, in refusing to grant an interlocutory injunction, did not abuse its discretion or apply improper rules of equity. The court committed no error in sustaining Section 8a and the order of March 3rd, since neither deprived the appellant of property without due process of law nor denied it the equal protection of the laws, and since the order of the Commission does not contravene the Commerce Clause of the Constitution.

Considering (1) the fact that the Commission was engaged in the discharge of an important governmental function, (2) that in the execution of such function it had exercised the power granted by a provision of the Public Utilities Act intended to aid it in fixing the reasonableness of the rates and operating expenses of the Chicago District Company, (3) that 27% of the stock of the appellant was owned by the parent company of Chicago District Company, (4) that Chicago District Pipeline Company and appellant have two directors in common, (5) that there is no competing natural gas company in the Chicago area and, (6) that the appellant had submitted estimates of its profits in an earlier proceeding, it must be clear that the statutory court entered the only order which could properly be entered under the circumstances of the case.

No evidence is necessary to demonstrate the validity of Section 8a, as it lays down a reasonable standard for inquiry by the Commission into transactions be-

tween affiliates and operating companies. We have already demonstrated that the principle of the *Western Distributing Company* case, *supra,* again cited to sustain the appellant's demand that the decision of the statutory court be reversed, clearly justifies the Commission's order.

We submit that this application of appellant for an injunction can be decided on the legal issues alone and that the District Court properly found for the appellees on those issues.

Appellant contends that this court should reverse the decision of the statutory court on the ground that the court abused its discretion, in denying the interlocutory injunction. We believe that it is clearly apparent that the statutory court applied proper principles of equity and did not abuse its discretion in denying plaintiff's application for an interlocutory injunction.

We submit that the decisions cited, *Ohio Oil Company* v. *Conway* (1929) 279 U. S. 813, 195, 73 L. Ed. 972, 49 S. Ct. 256; *Alabama* v. *United States* (1929) 279 U. S. 229, 230, 73 L. Ed. 675, 49 S. Ct. 266, and *Foster Packing Company* v. *Haydel* (1928) 278 U. S. 1, 73 L. Ed. 147, 49 S. Ct. 1, do not sustain appellant's contention.

In the *Ohio Oil case, supra,* suit was brought in the Federal District Court to enjoin the operation of a tax statute which did not provide for reimbursement of a taxpayer who paid his taxes, and then successfully attacked their validity. This court held that an interlocutory injunction should have been awarded and as a condition thereto, required a bond which would adequately protect the State in the event of its success upon final hearing. In this case, the appellant has not offered any indemnity against the serious damage which the appellees will suffer in the event that an interlocu-

tory injunction is ordered granted by this Court, and subsequently dissolved.

In the *Foster Packing Company case, supra,* this court held that an interlocutory injunction should have been granted and reversed the decision of a statutory court. In that case, however, the Louisiana statute, under review, prevented the shipment of shrimps outside the state boundaries which the court found to be a direct interference with interstate commerce. The regulation was not a conservation measure. In the instant proceeding, the order of March 3rd only incidentally affects interstate commerce to the extent essential to perform an important governmental function.

The *Alabama case, supra,* clearly sustains the position which we have taken, namely, that this court should not disturb the decision of the statutory court. There the Interstate Commerce Commission had entered an order establishing certain intra-state rates intended to prevent discrimination. An application for an interlocutory injunction was denied and this ruling was affirmed by this court on the ground that in the absence of abuse of discretion the decision should not be disturbed. At page 230 of the official report, this court said:

> "Congress has manifested its solicitude that the power to grant writs of injunction against orders of the Interstate Commerce Commission shall be exercised with special care, by requiring the consideration of applications to be made by three judges, and by giving an appeal directly to this court both in the case of interlocutory orders and final decrees."

This statement applies with equal force to the entry of an interlocutory injunction against the appellee Commission for Congress has likewise provided for the consideration of such applications by a court of three

judges and by providing for a direct appeal to this court.

It has been held that an interlocutory injunction should be denied in the absence of a clear showing that the plaintiff will prevail on final hearing.

In *Hall Signal Co.* v. *General Ry. Signal Co.* (1907) 153 Fed. 907, in reversing an order granting an interlocutory injunction, the Circuit Court of Appeals stated:

> "Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied. * * * The attitude of the court may be stated in a single sentence: We think the record presents too many elements of doubt to warrant the issuing of a preliminary injunction" (pp. 908-909).

Nor is the entry of a preliminary injunction warranted in the absence of a clear showing of irreparable injury where its issuance may seriously embarrass the carrying out of an important governmental function.

In *Hurley* v. *Kincaid* (1932) 285 U. S. 95, 104, 76 L. Ed. 637, 52 S. Ct. 267, in the note on that page, the Court said:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury."

This court has frequently held in confiscation cases that injunctive relief is not warranted except upon a clear showing of violation of constitutional rights.

In *San Diego Land and Town Company* v. *National*

City (1899) 174 U. S. 739, 754, 43 L. Ed. 1154, 19 S. Ct. 804, the court said:

> "* * * judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

In *Knoxville* v. *Knoxville Water Company* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148, the Supreme Court held that state rate statutes should be enjoined "only in the clearest cases," and in *Aetna Insurance Company v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174, said, "it must clearly appear that the rates would necessarily deny to the plaintiff just compensation."

In *Public Service Commission* v. *Wisconsin Telephone Company* (1933) 289 U. S. 67, 70-71, 77 L. Ed. 1036, 53 S. Ct. 514, where a preliminary injunction was set aside because of the absence of specific findings, suit having been brought to restrain a rate reduction order, the court said:

> "Thus, if the issue is confiscation, the complainant must make a factual showing of the probable confiscatory effect of the statute or order with such clarity and persuasiveness as to demonstrate the propriety in the interest of justice, and in order to prevent irreparable injury, of restraining the State's action until hearing upon the merits can be had."

We submit that on the basis of the above authorities this court should not disturb the decision of the statutory court.

The Court should order the bill of complaint dismissed since appellant has failed to show that any substantial or irreparable injury will result from its compliance with the order of the Commission.

(Appellant's Brief, pp. 47-49.)

In the consideration of this case the Court will note that appellant's bill of complaint was predicated in part upon an allegation that the commission intended to regulate its rates and that the order of March 3rd was a preliminary step to the Commission's plan to determine the reasonableness of the price to be paid by the Chicago District Co. for gas purchased from appellant. (R. 6, Bill of Complaint, paragraph 11.)

Appellees have denied this allegation in their sworn answer. The appellant has shifted its ground for it no longer argues that the Commission contemplates direct regulation of its rates. To the extent then that the bill is predicated upon this allegation, its bill of complaint should be dismissed since an injunction will not be issued in the absence of threat of actual or substantial injury. In *McChord* v. *Louisville & N. R. R. Co.* (1902) 183 U. S. 483, 502, 46 L. Ed. 289, 22 S. Ct. 165, suit was brought to enjoin a State Commission from proceeding under a statute authorizing it to fix railway rates. It was contended that the act in question was unconstitutional. It appeared that the Commission had taken no steps to fix the railroads rates. The District Court dismissed the bill of complaint and its decision was affirmed by the Supreme Court. The Court held:

> "that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at

all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record."

In its argument alleging irreparable injury if it is compelled to comply with the Commission's order, appellant states on page 12 of its brief:

> "The injury of which the Court is asked to take cognizance is the damage which will ensue immediately upon compliance with the order already issued. Irreparable loss to the appellant will not await the final incidence of the rate order which the Commission is preparing to make against the Chicago District Company. Great and irremediable damage to appellant's business will be inflicted immediately by compliance with the Commission's interlocutory order. This damage includes the cash outlay involved in compliance, injury to appellant's credit and the effect thereof upon its cost of operation and program of expansion."

It should be readily apparent to the Court that in so far as the appellant will be injured as a result of the expense of complying with the order of March the 3rd, such expense does not warrant further hearings on its bill or justify reversal of the decision of the District Court. If, as we submit we have demonstrated, it is true that Section 8a does not violate the Due Process clause, and the Commission's order does not violate the Commerce Clause, the mere fact that the appellant will be required to expend money for the purpose of complying with the Commission's order, is not sufficient injury to warrant issuance of an injunction. Less data is required here than in the *Western Distributing Co.* case, or the *Smith* case because the property of appellant has been recently constructed and the order of March 3rd requires cost and earnings data only.

It is equally clear that the allegation that irreparable

injury to its credit will result from compliance with the Commission's order does not warrant reversal of the District Court's decision. The claim that injury will arise as a result of the mere disclosing of information as to its profits must be ignored because this is apparently predicated upon the erroneous notion that the publication of statements of earnings would adversely affect its credit. The appellant should have no greater difficulty in raising new money for extensions because of the fact that its earning statements have been made available to the Commission. In fact no cautious creditor would advance money without this type of statement.

Furthermore, if publication of earning statements had any really serious affect upon earnings the growth of the utility industry would have ceased many years ago.

When appellant claims that its credit will suffer irreparable injury it apparently is referring to possible future expansion and not its present financial status. These allegations as to injury are purely conjectural and hypothetical in character. The Constitution does not provide protection against such hypothetical claims as to profits.

In *West Ohio Gas Co.* v. *Ohio Commission* (1935) 294 U. S. 63, 78, 79 L. Ed. 773, 55 S. Ct. 324, Mr. Justice Stone, in a concurring opinion, declared:

> "The property for which constitutional protection is invoked is that used and useful in the public service, not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money."

In so far as the appellant's injury will arise from the indirect affect of a possible reduction in Chicago

District rates to its local distributing companies, obviously that allegation does not support the issuance of an injunction for the Commission has not cut Chicago District's rates. Even if the Commission were to cut those rates, it is difficult to see what right appellant would have for relief on this ground.

We again call the Court's attention to *State Corporation Commission* v. *Wichita Gas Co., supra.* Under this decision the order of March 3rd is legislative in character and therefore does not violate the due process clause.

We submit, therefore, that appellant has completely failed to make a showing of great and irreparable injury warranting the exercise of the jurisdiction of the Federal Court, and that, therefore, this Court should direct the District Court to dismiss its bill of complaint.

The appellees are now suffering and will continue to suffer substantial injury if denied access to the information demanded by the order of March 3rd. The Court should disregard the suggestion that even if appellees be found to be entitled to a final decree an interlocutory injunction should be granted.

(Appellant's Brief, pp. 50, 51).

On page 14 of this brief we have pointed out the serious adverse effect that an entry of an injunction would have upon the Commission's ability to determine the reasonableness of Chicago District's rate.

The suggestion, therefore, that this Court should set aside the decree of the statutory court because the information demanded in its order of March 3rd cannot now be used in the Peoples Gas Company rate proceedings should properly be ignored by the Court. The true rule of law is that unless the Court is convinced that the complainant will succeed at final hearing a preliminary injunction should be denied. *Hall Signal Co.* v. *General Railway Signal Co.*, 153 Fed. 907 (C. C. A. 2d. 1907).

A proper inference to be drawn from the argument made by the appellant on page 50 of its brief is that it does not expect to win the case upon final hearing, and that it merely seeks to obtain injunctive relief for the purpose of delay.

The argument set forth at pages 52-54 of Appellant's Brief is not material to the issues in this case.

The arguments advanced by appellant at pages 52, 53 and 54 of its brief are directed entirely to sustaining the jurisdiction of the federal court over the subject matter of this cause. We have not questioned the right of the statutory court to entertain a case of this kind, but we contended below and still maintain that the bill of complaint and the affidavits in support thereof, do not set up such a situation as would justify a federal court of equity in issuing an injunction to restrain the action of the State Commission.

The size of the penalties provided in the Illinois Public Utility Act are not alone sufficient to warrant the interference of a federal court of equity, when as we have already pointed out, the Commission's order does not infringe upon any of the rights guaranteed to the appellant by the Constitution of the United States. The cases cited by appellant at pages 53 and 54 do not warrant the issuance of an injunction to restrain the enforcement of the Commission's order, when as here, no violation of the constitutional rights is shown by the appellant for such an injunction. Those cases apply only if some grounds for equitable relief appear. No such grounds do appear in this case, as we have already pointed out.

CONCLUSION.

I.

We respectfully submit that inasmuch as we have demonstrated hereinabove (1) that the order of the Commission complained of was duly authorized by Section 8a of the Illinois Public Utilities Act, (2) that Section 8a of the Public Utilities Act does not contravene either the 14th Amendment or the Commerce Clause of the Constitution of the United States, (3) the statute is a valid part of the legislative rate-making process of the State of Illinois, (4) the order was entered for the purpose of enabling the Commission to determine the reasonableness of the rates and operating expenses of the Chicago District Pipeline Company, a local public utility subject to its jurisdiction, (5) that the order of the Commission is in the nature of a subpoena, (6) that no substantial or irreparable injury will be suffered by appellant by the denial of an interlocutory injunction, and (7) that the Commission will be seriously injured and hampered in its regulation of an intrastate public utility company if it is not able to secure the information sought, the order of the statutory court of July 2, 1937, should be affirmed.

II.

Since the questions involved in this case are entirely questions of law as we have pointed out, since no useful purpose would be served by a hearing of evidence in this cause and since appellants allegations as to damages to be suffered are not only unfounded but predicated largely upon alleged injuries to be suffered in the event the Commission reduces the rates of the Chicago District Pipeline Company, this suit is premature, and we respectfully submit that the lower court should be instructed to dismiss the bill filed by appellant.

Respectfully submitted,

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APPENDIX A.

Sec. 8a of the Illinois Public Utilities Act Referred to in this Brief.

§ 8a. (1) The commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the commission to such extent as may be necessary to enable the commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section, the phrase "affiliated interests" means:

(a) Every corporation and person owning or holding, directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

(b) Every corporation and person in any chain of

successive ownership of ten per centum or more of voting capital stock;

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

(d) Every corporation, ten per centum or more of whose voting securities is owned, directly or indirectly by such public utility;

(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock;

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

(g) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

(h) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action

in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and consented to by the commission. *Provided, however,* that the commission shall have authority to condition such approval in such manner as it may deem necessary to safeguard the public interest. *Provided, further,* that the commission shall be empowered to except from the provisions of this subparagraph contracts or arrangements made in the ordinary course of business covering normal requirements at not to exceed standard or prevailing market prices. If it be found by the commission, after investigation and a hearing, that any such contract is not in the public interest, the commission is hereby authorized to disapprove such contract. Every contract or arrangement not consented to or excepted by the commission as provided for in this section shall be void.

The consent to any contract or arrangement as re-

quired above, shall not constitute approval of payments thereunder for the purpose of computing expense of operation in any rate proceeding.

(4) The commission shall have authority by general rules applicable alike to all public utilities affected thereby, to waive the filing and necessity of approval of contracts and arrangements described in subparagraph (3) of this section, where the total obligation to be incurred under or by reason of such contract or arrangement shall not be in excess of five hundred dollars ($500). *Provided, however,* that if the commission, after a hearing, finds that any public utility is abusing such general rule and thereby evading the purposes of subparagraph (3) hereof, the commission shall have power to require such public utility to thereafter file and receive the commission's approval upon all contracts and arrangements described in subparagraph (3) of this section, regardless of amount, and said general rule herein referred to shall remain in full force and effect as to all other public utilities. (Chap. 111⅔, Ill. Rev. Stat. 1937, Sec. 8a.)

APPENDIX B.

Provisions of the Public Utilities Act of 1935 Referred to in this Brief.

DEFINITIONS

"SEC. 2 (11) 'Affiliate' of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

(B) any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified company;

(C) any individual who is an officer or director of such specified company, or of any company which is an affiliate thereof under clause (A) of this paragraph; and

(D) any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon affiliates of a company."

SERVICE, SALES, AND CONSTRUCTION CONTRACTS

"SEC. 13 (e) It shall be unlawful for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or sub-

sidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract, by which such affiliate undertakes to perform services or construction work for, or sell goods to, any such company of which it is an affiliate, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters, as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

ACCOUNTS AND RECORDS

"SEC. 15. (b) Every affiliate of a registered holding company or of any subsidiary company thereof, or of any public-utility company engaged in interstate commerce or not so engaged, shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records relating to any transaction of such affiliate which is subject to any provision of this title or any rule, regulation, or order thereunder, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations or orders thereunder." (Public, No. 333, 74 Cong. 15 U. S. C. A. —.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

v.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

Appeal from the District Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL APPENDIX.

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SUPPLEMENTAL APPENDIX.

Appendix C.

Certain provisions of the Public Utilities Act of Illinois (An Act Concerning Public Utilities, approved June 29, 1921, as Amended) referred to during Oral Argument.

Hearings—Orders—Record—Record on Appeal—Copies of Official Documents and Orders—Evidence—Notice.

§ 65. At the time fixed for any hearing upon a complaint, the complainant and the person or corporation complained of, and such persons or corporations as the commission

may allow to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record shall be preserved of all proceedings had before the commission, or any member thereof, or any assistant commissioner, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney.

In case of an appeal from any order or decision of the commission, under the terms of section 68 and 69 of this Act, a transcript of such testimony, together with all exhibits or copies thereof introduced and all information secured by the commission on its own initiative and considered by it in rendering its order or decision (and required by this Act to be made a part of its records) and of the pleadings, records and proceedings in the case, shall constitute the record of the commission: *Provided*, that on appeal from an order or decision of the commission, the person or corporation taking the appeal and the commission may stipulate that a certain question or certain questions alone and a specified portion only of the evidence shall be certified to the court for its judgment, whereupon such stipulation and the question or questions and the evidence therein specified shall constitute the record on appeal.

Copies of all official documents and orders filed or deposited according to law in the office of the commission, certified by a commissioner or by the secretary of the com-

mission to be true copies of the originals, under the official seal of the commission, shall be evidence in like manner as the originals.

In any matter concerning which the commission is authorized to hold a hearing, upon complaint or application or upon its own motion, notice shall be given to the public utility and to such other interested persons as the commission shall deem necessary in the manner provided in the preceding section, and the hearing shall be conducted in like manner as if complaint had been made to or by the commission. But nothing in this Act shall be taken to limit or restrict the power of the commission, summarily, of its own motion, with or without notice, to conduct any investigations or inquiries authorized by this Act, in such manner and by such means as it may deem proper, and to take such actions as it may deem necessary in connection therewith. With respect to any rules, regulations, decisions or orders, which the commission is authorized to issue without a hearing, and so issues, any public utility or other person or corporation affected thereby and deeming such rules, regulations, decisions or orders, or any of them, improper, unreasonable or contrary to law, may apply for a hearing thereon, setting forth specifically in such application every ground of objection which the applicant desires to urge against such rule, regulation, decision or order. The commission may, in its discretion, grant or deny the application, and a hearing, if had, shall be subject to the provisions of this and the preceding sections.

Service of Orders—Duty of Person Served.

§ 66. Every order of the commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing in the United States mail a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or in the case of a corporation, to any officer or agent thereof upon whom a summons of a court of record may be served in an action at law. Where said persons or corporations, or both, exceed three in number, service as hereinbefore provided may be upon the attorneys or representatives of record, if any there be; and in any event, mailing in the United States mail as hereinbefore provided, shall constitute service, without additional

proof of a receipt of said certified copy or copies of said order. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person and corporation upon whom it is served must, if so required in the order, notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Modication of Order or Decision—Rehearing—As Prerequisite to Appeal.

§ 67. Anything in this Act to the contrary notwithstanding, the commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions. Within thirty days after the service of any rule or regulation, order or decision of the commission any party to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing. The commission shall receive and consider such application and shall grant or deny such application within twenty days from the date of the receipt thereof by the commission. In case the application for rehearing is granted the commission shall proceed as promptly as possible to consider the matters presented by such application. No appeal shall be allowed from any rule, regulation, order or decision of the commission unless and until an application for a rehearing thereof shall first have been filed with and acted upon by the commission. No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the commission. An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any rule, regulation, order

or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and consideration of all the facts, including those arising since the making of the rule, regulation, order or decision, the commission shall be of the opinion that the original rule, regulation, order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may rescind, alter or amend the same. A rule, regulation, order or decision made after such rehearing, rescinding, altering or amending the original rule, regulation, order or decision shall have the same force and effect as an original rule, regulation, order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original rule, regulation, order or decision unless so ordered by the commission. Only one rehearing shall be granted by the commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after two years, and invoking the action of the commission thereon.

Appeals to Circuit Court—Procedure—Powers—Burden of Proof—Collateral Attack on Orders.

§ 68. Within thirty days after the service of any order or decision of the commission refusing an application for a rehearing of any rule, regulation, order or decision of the commission, or within thirty days after the service of any final order or decision of the commission upon and after a rehearing of any rule, regulation, order or decision of the commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the circuit or superior court of the county in which the subject-matter of the hearing is situated, or if the subject-matter of the hearing is situated in more than one county, then of any one of such counties, for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. The court first acquiring jurisdiction of any appeal from any rule, regulation, order or decision shall have and retain jurisdiction of such appeal and of all further appeals from the same rule, regulation, order or decision until such appeal is disposed of in such circuit or superior court. No proceeding to con-

test any rule, regulation, decision or order which the commission is authorized to issue without a hearing and has so issued shall be brought in any court unless application shall have been first made to the commission for a hearing thereon and until after such application has been acted upon by the commission, nor shall any person or corporation in any court urge or rely upon any grounds not set forth in such application for a hearing before the commission, but the commission shall decide the questions presented by said application with all possible expedition consistent with the duties of the commission. The party taking such an appeal shall file with the secretary of the commission, written notice of said appeal. The commission, upon the filing of such notice of appeal, shall, within five days thereafter, file with the clerk of the circuit or superior court to which such appeal is taken a certified copy of the order appealed from and within twenty days thereafter the record provided for in section 65. The party serving such notice of appeal shall, within five days after the service of such notice upon the commission, file a copy of said notice, with proof of service, with the clerk of said court to which such appeal is taken, and thereupon said circuit or superior court shall have jurisdiction over said appeal and the same shall be entered upon the records of said circuit or superior court and shall be tried therein without formal pleadings, but otherwise according to the rules governing other civil cases, so far as the same are applicable. No circuit or superior court shall permit a party affected by any rule, regulation, order or decision of the commission to intervene or become a party plaintiff or appellant in such court who has not taken an appeal from such rule, regulation, order or decision in the manner as herein provided.

A circuit or superior court to which any such appeal is taken shall have the power, and it shall be its duty, in term time or vacation, to hear and determine such appeal with all convenient speed. No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the commission as certified to by it. The findings and conclusions of the commission on questions of fact shall be held *prima facie* to be true and as found by the commission; and a rule, regulation, order or decision of the commission shall not be set aside unless it clearly

appears that the finding of the commission was against the manifest weight of the evidence presented to or before the commission for and against such rule, regulation, order or decision, or that the same was without the jurisdiction of the commission. If it appears that the commission failed to receive evidence properly proffered, on a hearing or a rehearing, or an application therefor, the court shall remand the case to the commission with instructions to receive the testimony so proffered and rejected, and to enter a new order based upon the evidence theretofore taken, and such new evidence as it is directed to receive, unless it shall appear that such new evidence would not be controlling, in which case the court shall so find in its order. Rules, regulations, orders or decisions of the commission shall be held to be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.

When no appeal is taken from a rule, regulation, order or decision of the commission, as herein provided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for a writ to enforce the same, or in any other judicial proceeding.

Attorney General to Represent Commission on Appeals.

§ 68a. In all appeals from the orders and decisions of the commission, it shall be the duty of the Attorney General to represent the commission and defend its orders and decisions.

Appeals to Supreme Court.

§ 69. Appeals from all final orders and judgments entered by the said circuit or superior court, in review of rules, regulations, orders or decisions of the commission, may be taken directly to the Supreme Court by either party to the action, within sixty days after the entry of the order or judgment of said circuit or superior court, and shall be governed by the rules applying to other civil cases appealed to said Supreme Court, except that formal pleadings shall not be required.

Priority in Hearing and Determination.

§ 70. Any proceeding in any court in this State directly affecting a rule, regulation, order or decision of the commission, or to which the commission is a party, shall have priority in hearing and determination over all other civil proceedings pending in such court, excepting election contests.

Suspension of Orders Pending Judicial Review.

§ 71. The pendency of an appeal shall not of itself stay or suspend the operation of the rule, regulation, order or decision of the commission, but during the pendency of such appeal the circuit or superior court, or the Supreme Court, as the case may be, in its discretion may stay or suspend, in whole or in part, the operation of the commission's rule, regulation, order or decision.

No order so staying or suspending a rule, regulation, order or decision of the commission shall be made by the court otherwise than upon three days' notice to the commission and after a hearing, and if the rule, regulation, order or decision of the commission is suspended, the order suspending the same shall contain a specific finding based upon evidence submitted to the court, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage.

When any rate or other charge has been in force for any length of time exceeding one year, and such rate or other charge is advanced by the public utility and the order of the commission reinstates such prior rate or other charge, in whole or in part, no suspending order shall be allowed in any case from such order pending the final determination of the case in the circuit or superior court, or if appealed to the Supreme Court by such Supreme Court.

In case the rule, regulation, order or decision of the commission is stayed or suspended, the order of the court shall not become effective until a suspending bond shall first have been executed and filed with, and approved by the commission (or approved, on review, by the court) payabe to the people of the State of Illinois, and sufficient in amount and security to insure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the rule, regulation, order or decision

of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the rule, regulation, order or decision of the commission, in case said rule, regulation, order or decision is sustained. However, no bond shall be required in the case of any stay or suspension granted on application of the state, or of any city or other governmental body. The court, in case it stays or suspends the rule, regulation, order or decision of the commission in any manner affecting rates or other charges or classifications, may, in its discretion, also by order direct the public utility affected to pay into court, from time to time thereto to be impounded until the final decision of the case or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe, all sums of money which it may collect from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the rule, regulation, order or decision of the commission had not been stayed or suspended.

Mandamus or Injunction Proceedings at Instance of Commission—Appeal.

§ 75. Whenever the commission shall be of the opinion that any public utility is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, regulation, direction or requirement of the commission, issued or made under authority of this Act, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or any order, decision, rule, regulation, direction or requirement of the commission, issued or made under authority of this Act, the commission shall commence an action or proceeding in the circuit or superior court or in any other court of concurrent jurisdiction in and for the county in which the case or some part thereof arose, or in which the person or corporation complained of, if any, has its principal place of business, or in which the person complained of, if any, resides, in the name of the People of the State of Illinois, for the purpose of having such violation or threatened violation stopped and prevented, either by mandamus or injunction. The commission shall begin

such action or proceeding by petition to such circuit or superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding twenty days after the service of the copy of the petition, within which the public utility complained of must answer the petition, and in the meantime said public utility may be restrained. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. An appeal may be taken from such final judgment in the same manner and with the same effect, subject to the provisions of this Act, as appeals are taken from judgments of the circuit or superior court in other actions for mandamus or injunction.

Penalty for Violation of Act by Corporation—Separate Offenses.

§ 76. Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction or requirement or any part or provisions thereof, of the commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, shall, upon conviction, be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction or requirement of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

In construing and enforcing the provisions of this Act relating to penalties, the act, omission, or failure of any

officer, agent, or employee of any public utility acting within the scope of his official duties or employment, shall in every case be deemed to be the act, omission, or failure of such public utility.

Penalty for Violation of Act by Individual.

§ 77. Every person who, either individually, or acting as an officer, agent or employee of a public utility or of a corporation other than a public utility, violates or fails to comply with any provisions of this Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the commission, made or issued under authority of this Act, or who procures, aids or abets any public utility in its violation of this Act or in its failure to obey, observe or comply with this Act or any such order, decision, rule, regulation, direction, or requirement, or any part or portion thereof, in a case in which a penalty is not otherwise provided for in this Act, is guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

Actions to Recover Penalties.

§ 78. Except as otherwise provided in this Act, actions to recover penalties under this Act shall be brought in the name of the People of the State of Illinois in the Circuit or Superior Court in and for the county in which the cause or some part thereof, arose or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides. Such action shall be commenced and prosecuted to final judgment by the commission. In any such action, all penalties incurred up to the time of commencing the same may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State in any such action shall be paid into the State treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

SUPREME COURT OF THE UNITED STATES.

No. 230.—October Term, 1937.

Natural Gas Pipeline Company of America, Appellant, *vs.* James M. Slattery, Andrew Olson, Charles E. Byrne, et al., etc.	Appeal from the District Court of the United States for the Northern District of Illinois.

[December 6, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal presents the question whether the court below rightly denied an application for an interlocutory injunction restraining appellees, members of the Illinois Commerce Commission, from enforcing an order by which appellant was directed to open its records and accounts to inspection by the commission and to furnish certain statistical data for use in a proceeding pending before it. The proceeding was brought to fix rates charged for gas sold in Illinois by the Chicago District Pipe Line Company, an affiliated corporation.

Appellant, a Delaware corporation, sells in Illinois natural gas, which it transports through its pipe lines from Oklahoma to points in Illinois where, pursuant to a long term contract, it delivers the gas to the District Company, an Illinois corporation. The latter is engaged in intrastate commerce in Illinois where it sells the gas, which it purchases from appellant, to other companies which in turn distribute the gas to consumers within the state. The rates of the District Company are subject to regulation by the commission, as provided by the Illinois Public Utilities Act. All its shares of stock are owned by the Natural Gas Investment Company, an Illinois corporation, which owns 26.63% of the outstanding shares of appellant. Of the eight or nine directors of appellant, at all times since its incorporation, two have been members of the board of directors of either the Investment Company or of corporations wholly controlling it or the District Company, through stock ownership. The commission has found that the president of the District Company is president and director of the Investment Com-

pany and a director of appellant, and that a director of the District Company and of the Investment Company is a vice-president and director of appellant.

Section 8a (2) of the Illinois Public Utilities Act, Ill. Rev. Stat. 1937, c. 111⅔, § 8a, gives the commission jurisdiction over "affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions . . . and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe." The subsection defines "affiliated interests" as meaning:

"(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, . . .

"(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility."[1]

In November, 1936, the Commission, in the exercise of its authority under the Act, began a proceeding to which the District Company was, and appellant was not, a party, to determine whether the rates charged by the District Company should be reduced. After hearing evidence, the commission found that appellant was an affiliate of the District Company and that in order to fix reasonable rates for the sale of gas by the latter, inquiry was necessary into its operating charges including the cost of gas purchased from appellant. The commission accordingly made an order, the validity of which is assailed here, directing that appellant make available for examination by the commission all of its

[1] Section 8 (a) (2) also provides that "affiliated interests" mean:

"(g) Every corporation or person which the Commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and action of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

"(h) Every person or corporation who or which the Commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in connection with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action in concert that together they are affiliated with such public utility within the meaning of the section even though none of them alone is so affiliated."

accounts and records relating to transactions between it and the District Company. It further ordered that appellant file with the commission a report of the cost of property used in, and a statement of income and expenses in connection with, supplying gas to the District Company; or, in the alternative, that it report to the commission a statement of the cost of all properties used by it in the business of transporting and selling natural gas, together with a statement of the income and expenses of such operations.

In the present suit in equity, brought in the District Court for northern Illinois, petitioner prayed that appellees be enjoined from enforcing the order and that it be set aside as made without authority of state law, and on the further grounds that the statute and order are invalid because they violate the commerce, equal protection and due process clauses of the Federal Constitution. The case comes here on appeal, Judicial Code, § 266, from the order of the district court of three judges, which denied an interlocutory injunction. It held that appellant had failed to show that the order infringed any constitutional immunity or that appellant would suffer irreparable injury by reason of the action of the commission.

The court thought that the commission, in conducting the pending rate proceeding, and in investigating the reasonableness of the operating costs of the District Company, was entitled to the information it sought, which might be disclosed by an examination of appellant's accounts and records; that for that purpose the commission would have been entitled to compel their production by subpoena; and that as appellant had failed to present to the commission any objection to the breadth of the order, or to the use of an order rather than a subpoena to secure the information, no case was made for the interposition of a court of equity.

First. The appellant assails the statute as unconstitutional so far as it authorizes the commission to obtain from appellant's books and records any information bearing upon the reasonableness of the price of gas sold to the District Company. Appellant recognizes that the absence of "arm's length bargaining" between contracting affiliates is sufficient to support such an inquiry, and may be an adequate ground, in fixing the reasonable rates of a public utility company, for disregarding the price at which it purchases the commodity distributed. See *Western Distributing Co.* v. *Public Service Comm.*, 285 U. S. 119. But it is said that here the statute infringes the commerce clause and the Fourteenth Amendment

because it authorizes the inquiry without proof of common control or want of arm's length bargaining; that the Constitution forbids all inquiry as to the relations between the two companies and the prices at which the gas is sold by one to the other, in advance of proof of their common control or other evidence that the bargaining was not at arm's length. Assuming, without deciding, that the breadth of this attack relieves appellant of the necessity of applying to the commission to vacate its order before seeking equitable relief in the federal courts, see *Hollis* v. *Kutz*, 255 U. S. 452; cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 167, we think that the objection is not substantial.

We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. *International Harvester Company* v. *Kentucky*, 234 U. S. 579. It is similarly subject to garnishment and writ of attachment. *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 217 U. S. 157. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted. *Smith* v. *Alabama*, 124 U. S. 465; *Red "C" Oil Co.* v. *Board of Agriculture*, 222 U. S. 380; *Minnesota Rate Cases*, 230 U. S. 352, 402-412; *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm.*, 296 U. S. 261, and cases cited.

This Court has often recognized that the reasonableness of the price at which a public utility company buys the product which it sells is an appropriate subject of investigation when the resale rates are under consideration, and that any relationship between the buyer and seller which tends to prevent arm's length dealing may have an important bearing on the reasonableness of the selling price. *United Fuel & Gas Co.* v. *Railroad Comm. of Kentucky*, 278 U. S. 300, 320; *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 144; *Western Distributing Co.* v. *Public Service Comm., supra*, 124; *Dayton Light & Power Co.* v. *Public Utilities Comm. of Ohio*, 292 U. S. 290.

We have not said, nor do we perceive any ground for saying, that the Constitution requires such an inquiry to be limited to those cases where common control of the two corporations is secured through ownership of a majority of their voting stock. We are not unaware that, as the statute recognizes,[2] there are other methods of control of a corporation than through such ownership. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry. In these circumstances appellant can hardly object to the attempted inquiry into the fairness of the price. Cf. *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 90, and cases cited; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599; *Western Distributing Co.* v. *Public Service Comm., supra*, 124; *Globe Woolen Co.* v. *Utica Gas & Elec. Co.*, 224 N. Y. 483. The price itself may be found to be so exorbitant as to persuade that the bargaining was not at arm's length. *Corsicana National Bank* v. *Johnson, supra.* We cannot say that the Illinois statute is subject to any constitutional infirmity in so far as it demands access to the books and accounts of appellant or requires production of the information which the order seeks.

Second. Appellant also challenges the order of the commission as a first step in the direction of unconstitutional action. But appellant is not a party to the pending proceeding, whose ultimate concern is the rates of the District Company. In that proceeding the commission can make no order binding on appellant with respect to its own rates or its contract. Cf. *State Corporation Comm.* v. *Wichita Gas Co.*, 290 U. S. 561. There is no contention that the commission threatens to make any order modifying or cancelling either. The statute does not prescribe the effect which the commission is to give to the information sought. Assuming without deciding that it cannot rightly be made the basis for disregarding the price at which appellant sells gas to the District Company, unless as the result of the inquiry there appears to be in some form an effective single control of the two companies, we cannot also assume that the commission will arbitrarily make such use of it in fixing the District Company's rates. It will be time enough to

[2] See footnote 1, *supra.*

challenge such action of the commission when it is taken or at least threatened, *First National Bank* v. *Albright*, 208 U. S. 548; *Dalton Adding Machine Co.* v. *State Corporation Comm.*, 236 U. S. 699, and to consider whether appellant has standing to make the challenge. The commission is not to be enjoined from seeking information whose probable usefulness is established, as it is in this case, by the statutory prerequisite of partial community of management or stock ownership.

Third. Appellant urges that, in requiring statistical reports, the expense of whose preparation is said to be great, the order transcends statutory authority, or exercises it so arbitrarily as to place an unconstitutional burden on commerce and infringe the Fourteenth Amendment. It is said that equity alone can afford adequate relief because of the cumulative penalties for failure to comply with the order. See §§ 76 and 77 of the Act.

We have no occasion to consider the merits of these objections. It sufficies to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By §§ 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was "improper, unreasonable or contrary to law." Section 67 authorizes the commission at any time, upon proper notice and hearing, to "rescind, alter or amend any . . . order or decision made by it." We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 470, 287 U. S. 346.

As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, *Ex parte Young*, 209 U. S. 123, 147; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 349; see *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 659, but no reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Re-

fusal of postponement would have been the occasion for recourse to the courts. Compare *Oklahoma Gas Co.* v. *Russell,* 261 U. S. 290, 293, with *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210; *Ex parte Young, supra,* 156. But appellant did not ask postponement.

A temporary injunction was not necessary to protect appellant from penalties pending final determination of the suit. The commission agreed not to enforce the order before the decision of the lower court on the application for interlocutory injunction. In order to give appellant opportunity to appeal here the district court stayed, for thirty days, its order denying an injunction, and by an order of a Justice of this Court the operation of the commission's order and the running of penalties were enjoined pending the disposition of the cause here.

The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117, 123; *Porter* v. *Investor's Syndicate, supra; Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575; see *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463, 464-466, is of especial force when resort is had to the federal courts to restrain the action of state officers, *Matthews* v. *Rodgers,* 284 U. S. 521, 525-526; *Porter* v. *Investors' Syndicate,* 286 U. S. 461, 287 U. S. 346; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Comm.,* 290 U. S. 264, 271; *De Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, and the objection has been taken by the trial court. *Matthews* v. *Rodgers, supra.*

The extent to which a federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. *Hollis* v. *Kutz, supra; United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 282; cf. *United States* v. *Sing Tuck, supra.* But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances the trial court is free to withhold its aid entirely until administrative remedies have been exhausted.

Affirmed.